KIT-LO
No. 304

In the Supreme Court of the United States

October Term, 1943.

BOYD L. KITTCART, *Petitioner*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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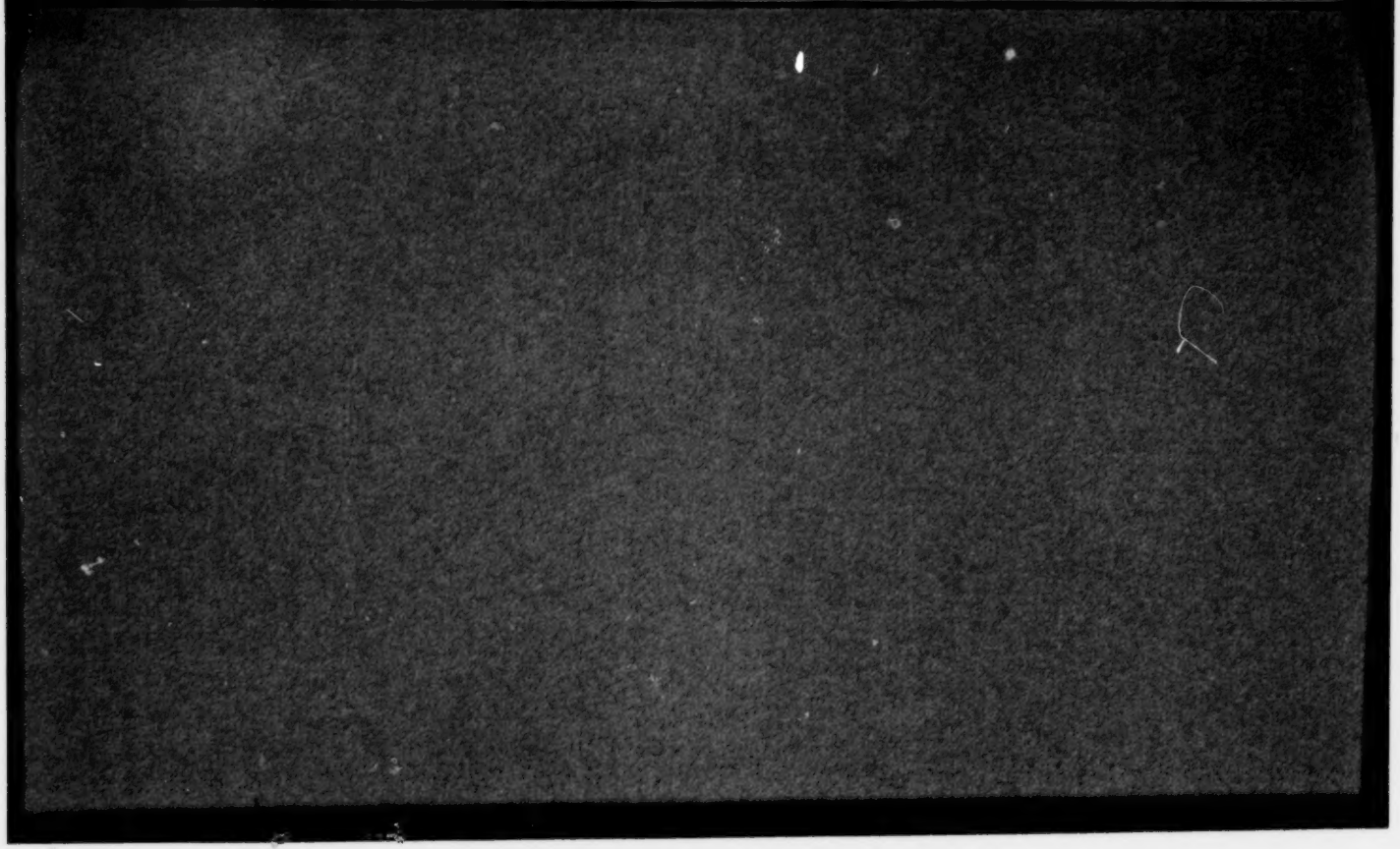

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To the Honorable Supreme Court of the United States:

Your petitioner respectfully says:

A.

Summary statement of the matter involved.

Petitioner, a citizen of the United States of America, resident in Missouri, made a contract with respondent on June 14, 1929 (3), in which contract petitioner was insured against accidental loss of life, limb and time from accidental injury. At said time respondent, a New York

corporation, was engaged in the business of making such contracts with citizens of the United States, resident in Missouri (3).

Petitioner instituted an action to reform said contract in a Missouri State court on February 24, 1944. Respondent removed the case to the Western Missouri District Federal court. Petitioner filed his plea to the jurisdiction, alleging that Sections 28 and 29, Judicial Code (71, 72, Tit. 28 U. S. C. A.), were void because in conflict with Amendments XIV, X and IX of the Constitution. Respondent moved to dismiss, alleging that (45-46):

> "The pretended cause of action alleged or attempted to be alleged in plaintiff's first amended petition or first amended complaint is barred by laches and by the Statutes of Limitation of the State of Missouri."

The amended pleading combined a count or suit in equity with a count on an action at law in two counts.

The District Court overruled the plea to the jurisdiction (48) and sustained the motion to dismiss on another alleged ground that the judgments in five prior actions (one stated by the Court of Appeals to be on the policy as it stood (74), and two suits in the nature of bills of review of that case, and two actions for damages against respondent and appellants, all of said actions being on alleged causes of action different from this reformation suit) were *res judicata* (50) of the issues in the suit to reform.

On July 31, 1945, the Court of Appeals affirmed the judgment of dismissal, declined to rule on the question of *res judicata,* and placed its affirmance on the baseless ground that the action was barred by Sections 1013 and 1014, R. S. Mo. 1939. Neither of said statutes nor any statute was pleaded by respondent. The ineffective plea

of limitations was not directed at either count of petitioner's pleading. The District Court dismissing, recited (49):

> "Plaintiff claims he sustained an accident compensable under the contract. He alleges, however, that an essential provision of the contract actually agreed upon was that the plaintiff was sound in mind and body when the contract was entered into. That provision of the contract, it is alleged, was embodied in certain documents attached to the application. The contract sought to be reformed, it is alleged, does not contain the provisions referred to."

The District Court order overruling the plea to the jurisdiction, recites (48):

> "The (removal) statute plainly is authorized by Section 2 of Article III of the Constitution. It has been so held by the Supreme Court (as to diversity of citizenship cases) at least since the decision of *Insurance Company* v. *Dunn*, 19 Wall. 214, a case decided in the October, 1873, term of the Supreme Court. That decision was bottomed on principles declared in *Martin* v. *Hunter*, 1 Wheaton 333."

The District Court ignored the fact apparent from his petition that petitioner instituted the suit "as a citizen of the United States, resident in Missouri." It erroneously ruled that the suit was "wholly between citizens of different States" within the meaning of said language in Sec. 28, Judicial Code (71 U. S. C. A.).

The Court of Appeals placed its affirmance of the ruling on the plea to the jurisdiction on the same theory, ignoring the above allegation (3) and petitioner's contentions that this was a suit between petitioner "as a citizen of the United States" and respondent "who entered into the

contract with him as a citizen of the United States," which contentions, based on the pleaded facts, were made in petitioner's brief in the Court of Appeals. We reproduce page 9 of said brief:

"9

"STATEMENT OF POINTS TO BE ARGUED AND AUTHORITIES.

"I.

"The District Court erred in refusing to take notice of the alleged and admitted fact that appellant is a citizen of the United States, and that the Acts of Congress, Secs. 71 and 72, Title 28, U. S. C. A., as applied to appellant as such citizen denied him the protection of the privileges and immunities clause of the XIVth Amendment, which guaranteed to appellant as such citizen the right to institute and maintain this action in the courts of any State of the Union, including Missouri.

"A. The petition alleges appellant's citizenship of the United States, and that appellee's business was to insure such United States citizens resident in Missouri, which facts appellee's motion to dismiss admit.

"B. The command of the Act of Congress (Section 72) to the State Court 'to proceed no further' on the filing of the verdict petition and bond is, as applied to appellant in his capacity as a citizen of the United States, in direct conflict with said provision of the Constitution guaranteeing him the right to maintain this suit in the Missouri court, and in conflict with the IXth and Xth Amendments, and therefore void.

Section 1, XIVth Amendment (privileges and immunities clause).
Corfield v. *Coryell,* 1 Wash. C. C. 371, Fed. Cas. No. 3230.
Crandall v. *Nevada,* 6 Wall. 35-49.
Bradwell v. *Illinois,* 16 Wall. 130.
Ward v. *Maryland,* 12 Wall. 418.
Ex parte Flukes, 157 Mo. 125, l. c. 131, 132.
Colgate v. *Harvey,* 296 U. S. 404."

The opinion of the Court of Appeals, notwithstanding respondent's pleading failed to specify any statute of limitations, held that petitioner's action was barred by the provisions of Sections 1013 and 1014, R. S. Mo. 1939. The opinion says (78):

> "The petition attempts to escape the general statute of limitations and to bring itself within the special statute, Mo. R. S. A., Sec. 1014, which allows an action for relief on the ground of fraud to be instituted within 5 years after the accrual of the right, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

The Court of Appeals stated (79):

> "The trial court rested its dismissal or summary judgment-order on the ground that the insured's right to seek reformation was *res judicata*. Whether this ground was sound or not, we need not consider, for the bar of the statute of limitations is plain on the face of the petition."

The Circuit Court of Appeals cites *Guaranty Trust Company* v. *York*, 61 S. Ct. 1464, in support of its erroneous ruling on limitations (77). Said decision by this Court in the York case is in direct conflict with the said decision of said Court of Appeals.

Section 1014 was not mentioned in petitioner's pleading or briefs, nor in respondent's. The Missouri statutes or decisions hold that failure to plead the appropriate section of the statute of limitations waives it and that the Missouri court cannot plead it for him but must defeat him on that issue (*State ex rel. Matney* v. *Spencer*, 79 Mo. 314; *Knisely* v. *Leathe*, 256 Mo. 341; *Gibson* v. *Rans-*

dell, 188 S. W. (2d) 35), even though an action on the face of the petition be barred by an unpleaded statute (*Gibson* v. *Ransdell*, 188 S. W. (2d), l. c. 38; *Murphy* v. *De France*, 105 Mo. 53).

But the action was not barred. Sections 1012, 1031 and 5844 prevented the action from accruing until March 2, 1942. The proviso of Section 1012 added thereto in 1919 (Laws Mo. 1919, pp. 211-212) is made applicable to Section 1031, which latter statute provides that if any person by any "improper act" prevent the commencement of an action, such action may be commenced within the time limited by the other sections of Article 9, Chap. 6, R. S. 1939, after the commencement shall have ceased to be so prevented. And so, under Section 1013, petitioner had ten years after March, 1942, or at least after February 25, 1939, to institute the reformation suit.

Respondent's policy did not cover insane persons (Clause 9, 29). Petitioner's discharge record from the army recited that the form of insanity known as dementia praecox was the cause of his discharge. Respondent made an investigation and had petitioner examined by its own doctor, who found that petitioner was sound in body and mind and procured an affidavit from the army doctor establishing that the recital as to dementia praecox was a mistake. Thereupon respondent agreed that an explanatory letter by Denison, its own doctor's report, the army doctor's affidavit showing said mistake and a proposed sound risk (9-10) agreement should be attached to petitioner's application and with said application sent to respondent's home office for approval; and, if there approved, that said sound risk agreement with its standard policy would constitute the insurance contract; and that neither said army record nor any prior evidence

should ever be used by respondent in the event of any litigation with petitioner (10).

The premium for $19.70 was paid on June 14, 1929, by the check of petitioner's mother (11, Exhibit E, 37) and cashed on June 17 by respondent's manager (11). On June 14 the blanks in respondent's usual form of printed receipt were filled in as to date and the amount of $17.70 by respondent's agent, Denison, but not signed by him (11-12, 37). At the same time Denison represented to petitioner that he did not know whether respondent would charge petitioner two dollars more as a consideration for the sound risk agreement (12). On June 25, Denison called on petitioner and undertook to deliver the policy, Exhibit A (27), and called petitioner's attention to the recital in the policy under the heading (29)

"Standard Provisions.

> "1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance *except as it may be modified by the Company's classification of risks and premium rates.* * * *"

and also stated that the sound risk agreement was not attached to the policy for the reason that it was respondent's "classification of risk" of petitioner within the meaning of said quoted language and hence excepted by said exception from the preceding provision said that:

> "This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance, * * *"

and that said sound risk agreement did not need to be attached to the policy for said reason, but that nevertheless it was a part of the contract of insurance and that

respondent was holding same as a part of its record, but in trust for petitioner. The sound risk agreement itself as represented and prepared by Denison expressly declared that it was respondent's "classification of risk" and excepted from attachment to the policy. Said provision is (10):

> "*That first party hereby classifies the second party as a sound risk,* and is hereby estopped from all objection that any prior mental or bodily diseases or infirmity contributes to any future disability of the second party after said date. That no insurance is in force on this contract unless and until the Home Office of first party has approved the present contract, and that the approval of the Home Office will be and is sufficiently evidenced by the delivery of said policy to the second party. That said policy contains substantially the same agreements and declarations as this contract, and that this contract is hereby made a part of said policy, just as much as if it were printed therein."

As Denison promised, Marquis appeared on June 29, 1929, and signed his name to said receipt and on the side thereof wrote the words:

> "Received two dollars more * * * M. E. Marquis" 12, 37).

Denison's attention was called to the omission of the sound risk agreement from the copy of the application attached to the policy before delivery (11). Denison then represented that the omission was not a mistake (20), that it was not necessary to attach same to the policy, under provisions 1 and 2 of the standard provisions thereof (14). He further represented that the sound risk agreement was not an alteration or change in the policy under provision 2 thereof (14, 15). He also represented that the sound

risk agreement contained the same declaration and agreement with reference to sound health of body and mind as the application and policy (15, 10). Petitioner relied on said representations of Denison as Denison also represented to petitioner that he had theretofore long been an assistant manager for respondent, was familiar with its rules, regulations and methods of business, and that he had superior knowledge of the law of insurance, and was an expert in all branches of respondent's insurance business (15, 19). Petitioner believed Denison with reference to said matters, and especially with reference to the lack of necessity for attaching the sound risk agreement to the policy.

Though Denison was then in respondent's employ, he told petitioner that he was not in respondent's employ and was without authority to make the contract with petitioner, but that he (Denison) was only aiding Mr. Marquis, stating that Marquis was the authorized agent and that Marquis would receive the commission for making the insurance contract. Marquis was not present during the negotiations.

Thereafter, in December, 1929, petitioner paid a second premium. On January 11, 1930, petitioner accidentally sustained a totally disabling injury. Respondent refused to carry out its contract. Petitioner then engaged counsel, and both petitioner and his then counsel, believing that under the facts the sound risk agreement was part of the insurance contract, brought a suit to recover for permanent disability.

The cause found its way to the Federal court by removal, and at a trial in May, 1933, respondent, through its agents, witnesses and counsel, denied all knowledge of said sound risk agreement, denied that Denison was in respondent's employ either on June 14 or 25, 1929, and

objected to any evidence thereof, with the result that a judgment was rendered against petitioner. Denison, concealed by respondent, was not a witness (21).

Respondent concealed Denison's whereabouts from June, 1929, until 1935, when petitioner discovered him as respondent's manager in Salina, Kansas (21). Denison then refused to talk to petitioner and thereupon petitioner, pursuing a mistaken remedy, instituted a proceeding in the nature of a bill of review in the District Court, seeking to have the judgment of May, 1933, set aside. The District Court dismissed, and the Court of Appeals affirmed (88 Fed. (2d) 407). Its opinion treated Denison as a mere soliciting agent, whose conversations or representations did not bind respondent. Its opinion also declared that the purpose of the suit was to secure a new trial in the prior action at law and that "it is a strain upon the credulity of the court to believe that it was brought in good faith" (l. c. 411).

Two further mistaken actions for damages by petitioner against Denison, respondent and other agents, in the State court, were removed to the Federal court and promptly dismissed.

On February 25, 1939, petitioner obtained a photostatic copy of an application signed by him from respondent's assistant manager, with the signature of Marquis thereon as a witness instead of that of Denison. Denison's signature as a witness was purported to be typed on the copy of the application attached to the policy. An investigation then made resulted in the discovery that petitioner's contract was valid; that, notwithstanding the representations to the contrary, Denison was its agent on June 14 and 25, 1929; that Denison did have authority as respondent's agent to make the insurance contract; that the sound risk agreement was approved by respondent and signed

by respondent's district manager, Magoon, before delivery of the policy to petitioner on June 25, 1929.

Thereupon, petitioner still believing that the sound risk agreement did not need to be attached to the policy, in accordance with rule that a contract may consist of more than one paper, and that his newly discovered evidence would establish that fact and that he could have the judgment of 1933 set aside for concealment of evidence, instituted a further misconceived or mistaken proceeding in the District Court, which was promptly dismissed, and the judgment of dismissal was affirmed by the Court of Appeals (119 F. (2d) 497). Thereupon, petitioner *pro se* sought a writ of certiorari, which failed to state any legal grounds therefor, in this Court, which was properly denied (315 U. S. 808, No. 789) on March 2, 1942. Affidavits filed in said cause state facts with reference to discovery of the only competent evidence. Thereupon, petitioner for the first time ascertained, or became fully convinced that he and his then counsel had been pursuing mistaken remedies and that reformation was necessary.

The Court of Appeals, in its opinion, states (76, 76-77):

> "The reason given for the present attempted reformation is that the insured has been denied the right in his previous litigation to make proofs of this special provision as part of his contract, in view of the clause in the policy that 'No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.' The petition shows on its face, however, that that denial had been made as far back as 1933, by the insurer's objection and the trial court's ruling in the action initially brought on the policy, from which the insured took no appeal." • • •
>
> "The insured thus was advised, in 1933, by a specific legal ruling against him, which he did not

attempt to make the subject of an appeal, that it was impossible for him to claim the existence of any such extraneous provision to the policy in an action at law to recover benefits under it. In spite of this ruling, he has waited almost 11 years before bringing this suit for reformation."

But petitioner could not have instituted the suit to reform the insurance contract until February 25, 1939, because all of his knowledge that the sound risk agreement was approved by respondent was Denison's statement on June 25, 1929, to that effect. When respondent in May, 1933, at the trial, disclaimed all knowledge of said agreement, concealed and kept its employee, Denison, off the witness stand, and concealed his whereabouts until 1935, and the respondent's witnesses testified that Denison was not in the employ of respondent in June, 1929, then petitioner was led to believe that respondent had not approved, and he was without actual knowledge (other than Denison's statement repudiated by respondent at said trial), and without competent evidence to sustain any suit for reformation until on and after February 25, 1939, when he obtained the information embodied in affidavits on file in this Court in Cause No. 789 (October term, 1941), showing Denison's authority and respondent's approval, making the contract valid.

Petitioner himself was incompetent because he had no personal knowledge, at that time, of facts which bound respondent and was wholly without any witness to sustain any reformation suit; and this was a direct result of the improper acts of respondent, which operated under Sections 1031 and 1012, supplemented by Section 5844, to toll the statute of limitations by preventing the commencement of the reformation suit.

These facts destroy the conclusion of the Court of

Appeals that his cause of action accrued when respondent's witnesses Magoon and Marshall testified that they had no knowledge of the sound risk agreement; whereas said testimony, for the purpose of reformation, demonstrated that petitioner could not use them as witnesses, and that petitioner was led to believe that respondent did not make the contract. And also their testimony established, for reformation purposes, that Denison had no authority to make the alleged contract, and that Marquis was never present during the negotiations with Denison; and hence petitioner was wholly without any evidence on which to base the reformation suit until after February, 1939.

The Court of Appeals in its affirming opinion overlooked allegations that respondents defense in that action at law and the false statements of respondent's agents as to the lack of Denison's authority and that he was not in respondent's employ on June 14 and 25, led petitioner to believe that Dennison and the other agents

> "had not forwarded the said documents (sound risk agreement and other papers) to the home office of said defendant *and that for said reason the plaintiff did not have a valid contract of insurance until February 25, 1939,* on which date he again went to the office of the said defendant and requested its agent Marshall to give to plaintiff the original application signed by plaintiff, and that thereupon the said Marshall gave to this plaintiff the document with plaintiff's signature thereon and the name of M. E. Marquis which had been secretly and against the will of plaintiff signed thereto as a witness; photostatic copy of which is attached hereto as Exhibit C, which was different from the application as signed by R. G. Denison.
>
> "That, *on receiving said document on February 25, 1939, plaintiff immediately made an investigation*

> *and discovered that in truth and in fact the said agents had signed said document and said typewritten part of said insurance contract * * * and forwarded same to the home office of defendant.*"

The Court of Appeals overlooked (13) not only Section 1031, but also overlooked the fact that said section is quoted in *Rogers* v. *Brown*, 61 Mo. 187 (cited by the Court of Appeals), at p. 193 and points out that the equity doctrine as it existed before the statute was supported thereby to some extent but no

> "farther than it may be found to have been incorporated in the provisions of the 24th section (Sec. 1031, R. S. Mo. 1939) above quoted" (l. c. 194).

The Missouri court further said that no issue was made in *Rogers* v. *Brown*

> "as to any improper action on the part of defendants, preventing *the commencement of an action.*"

The action for reformation was not barred by any Missouri statute of limitations under the facts and Section 1014, R. S. Mo. 1939, only applied to actions based on fraud and could not apply to an action based on contract, and in any event Sections 1012 and 1031 applied to Section 1014.

The Court of Appeals overlooked the fact that the central paragraph on page 23 alleged a conspiracy in violation of Section 4632, R. S. Mo. 1939, and that the meticulous allegations between pages 5 and 23 concerned overt acts pursuant to said conspiracy to cancel and to prevent the commencement of the action, and that it is still

and is now continuing and that in such case the law of Missouri is thus:

> "The period of limitation commenced upon the occurrence of the last of the series of overt acts (resulting in damage) under the conspiracy." (*Kansas City* v. *Rathford,* 186 S. W. (2d) 570, l. c. 577.)

The Court of Appeals cites *Stark* v. *Zander,* 204 Mo. 442, and *Hoester* v. *Sammelman,* 101 Mo. 619, where fraud preventing the commencement of an action was not alleged as applicable to the facts in this case. But *Stark* v. *Zander* has no application. The opinion there says:

> "The case made in the petition is one of innocent mutual mistake." (l. c. 453.)

The opinion then sets out Section 4290, R. S. 1899. It is the same as Section 1031, R. S. Mo. 1939. It further says:

> "It is not charged *that either of the defendants was guilty of any act that prevented the plaintiffs from commencing their suit to reform the deeds.* Indeed the averment of mutual mistake negatives the idea of fraudulent conduct." (l. c. 453.)

The Missouri Supreme Court, in *Citizens Bank of Festus* v. *Frazier,* 177 S. W. (2d) 477, l. c. 482, refused to follow said decisions in a case where the principle involved was like that at bar, saying:

> "The cases (Stark and Hoester, *supra*) are not controlling here. We think that Sec. 1031, R. S. 1939, Mo. R. S. A., is applicable to the facts here since defendants Frazier and wife, by continuing fraudulent conduct concealed the original fraud and prevented and delayed the commencement of the action. The

action was timely brought and was not barred by Section 1013, *Supra. Clubine* v. *Frazier,* 346 Mo. 1 *Branner* v. *Klaber,* 330 Mo. 306."

These facts make the principles stated in ***Sonninfield*** v. *Millinery Co.,* 241 Mo. 309, applicable. The defendant there prevented the commencement of the action by keeping possession of the papers on which it was founded and other misrepresentation. This act was held, under Section 1031, R. S. Mo. 1939, to toll the statute of limitations.

Petitioner had theretofore believed that Denison's representation that he had been respondent's assistant manager and had been familiar with the making of insurance contracts, and therefore knew everything about the making of insurance contracts both as to law and fact, that therefore his representations in connection with the above quoted provision of the policy were correct until the Circuit Court of Appeals (119 Fed. (2d) 497) held the evidence inadmissible, and this Court, by denying certiorari, finally appraised and convinced him that the policy should be reformed by this suit for reformation thereof, under the law as stated by this Court in *Northern Assurance Company* v. *Grandview Building Association,* 203 U. S. 106 (followed by the Missouri court in *Baumhoff* v. *Railway,* 203 Mo. 268), and also as stated in *Equitable Ins. Co.* v. *Hearne,* 20 Wall. 294, and other cases.

B.

Statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

The decision and opinion of the Circuit Court of Appeals applied the unpleaded and inapplicable Section 1014 R. S. Mo. 1939 to bar petitioner's action. It ignored

Sections 1012 and 1031 R. S. Mo. 1939, which prevented the action from accruing until respondent's "improper acts" ceased to prevent the commencement of the action, either on February 25, 1939, or March 2, 1942, after which dates petitioner had the ten years authorized by Section 1013 to sue. *Butler* v. *Lawson,* 72 Mo. 227.

It ignored the construction of the Missouri statute of limitations in *Matney* v. *Spencer,* 79 Mo. 314; *Knisely* v. *Leathe,* 256 Mo. 341, and *Gibson* v. *Ransdell,* 188 S. W. (2d) 35, l. c. 38, and thereby violated Section 725, Title 28, U. S. C. A., even as construed by this Court in *Swift* v. *Tyson,* 16 Pet. 1, declaring:

> "The true interpretation of the thirty-fourth section limited its application to State laws strictly local, that is to say, to the positive statutes of the state, and to the construction thereof adopted, by the local tribunals."

The decisions of this Court in *Guaranty Trust Company* v. *York,* 65 S. Ct. 1464, applying said acts of Congress to suits in equity, and in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, were likewise ignored by the decision and opinion of said Court of Appeals.

This Court has jurisdiction to review the judgment of the Court of Appeals and the record, because it appears from the opinion and record that said Court of Appeals denied to petitioner the benefit of the law of the State of Missouri with reference to the statutes of limitations of said State by itself selecting an unpleaded statute of limitations which was without application to the action grounded on contract sued on, and applying a statute which only applied to actions grounded on fraud, whereas said action was not barred by any statute of limitation of the State of Missouri.

The Circuit Court of Appeals also failed to include in its opinion, and ignored in its decision, the facts admitted by respondent that it had, by its own wrongful acts of the variety mentioned in Section 1031, R. S. Mo. 1939, prevented the commencement of the action until March 2, 1942, and therefore prevented any statute of limitations from barring petitioner's action for reformation. Said opinion and decision of said Circuit Court of Appeals on said questions is in direct conflict with the opinions and decisions of this Court in *Guaranty Trust Co. of New York* v. *York*, 65 S. Ct. 1464, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, *Holmberg et al.* v. *Armbrecht et al.*, (C. C. A. 2) 150 F. (2d) 829.

The Court of Appeals has decided an important question of federal law which has not been settled by this Court, to-wit: whether the privileges and immunities clause of the XIVth Amendment guarantees to a citizen of the United States a right to maintain a suit to its conclusion by a decision of the issues therein in a State court in which he had instituted it. The Court of Appeals erroneously disposed of the case by deciding that the suit was wholly between citizens of different States; whereas it was not, but was between a citizen of the United States resident in Missouri, and a nonresident corporation which had contracted with him as a citizen of the United States. Said question has not been but should be settled by this Court. Said decision is probably in conflict with applicable decisions cited herein.

Said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to fail to state the facts in its opinion which appear from the petition, showing that respondent by the wrongful acts mentioned in Section 1031, R. S. Mo. 1939, prevented the institution of petitioner's suit until March, 1942. And has

also so far departed from said course that it ignored the allegations of the petition showing that petitioner is a citizen of the United States, and that as such citizen he made the contract with the respondent, and then, in its opinion, merely declared that the action was wholly between citizens of different States.

The Court of Appeals, by affirming the judgment of the District Court, so far sanctioned the departure of the District Court from the accepted and usual course of judicial proceedings in using the following language concerning petitioner and his case when he dismissed it (49, 50), to-wit:

> "This venerable controversy haunts us like a ghost which cannot be laid. Once our colleague put an end to it. Twice we buried it. Twice the Court of Appeals not only refused to resurrect it, but almost spat on the grave. Here it comes again.
>
> "It is difficult to avoid thinking that the plaintiff individually (not his learned and highly esteemed counsel) has set out to harass both the defendant and the courts."

C.

The Questions Presented.

Whether said language established a personal prejudice against petitioner which disqualified the District Judge and deprived the District Court and Judge of jurisdiction to decide the case and deprived petitioner of the benefit of due process.

Whether or not the decision of the Circuit Court of Appeals, in applying a nonapplicable statute of limitations, not even pleaded, of the State of Missouri to bar petitioner's action for reformation of a contract, to which action said statute had no application and which statute

did not, nor did any other under the law of the State as decided by its appellate courts, bar the action, by its conflict with the decisions in *Guaranty Trust Company* v. *York*, 65 S. Ct. 1464, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Holmberg* v. *Armbrecht*, 105 Fed. (2d) 829, render its judgment invalid.

Whether or not the privileges and immunities clause of Section 1 of the XIVth Amendment to the Constitution of the United States guaranteed to petitioner as a citizen of the United States the right to "maintain" his suit for reformation against respondent in the Missouri State Court in which he had instituted said suit or action, until said court had exhausted its jurisdiction by deciding the issues therein. Whether Sections 28 and 29 of the Judicial Code (71, 72, Title 28 U. S. C. A.) are void because in conflict with the XIVth, IXth and Xth Amendments thereto.

Whether or not the Circuit Court of Appeals by ignoring the allegation in petitioner's pleading that he was a citizen of the United States, and that respondent made the contract sought to be reformed with him as such citizen, could lawfully ignore said allegation and dispose of the case by deciding that it was a controversy wholly between citizens of different States.

Whether or not the Court of Appeals could dispose of the case by omitting from its opinion the fact showing that respondent had, by its improper acts, within the meaning of Section 1031, R. S. Mo. 1939, prevented the accrual of petitioner's right to, or action for, reformation, and the commencement of the action under Section 1012.

Whether the failure of the Circuit Court of Appeals to reverse or approve the action of the District Court in erroneously holding that the judgments in prior actions based on the policy alone were *res judicata* of the different

issues and subject matter of the suit for reformation based on the entire contract, consisting of the policy and sound risk agreement, departed from the accepted and usual course of judicial proceedings.

Whether a nonresident corporation, in a case where there is no local prejudice or influence, in a State in which a suit against it was filed by a resident of a State, may give the Federal Court jurisdiction thereof by removal.

Whether fatuous pursuit of mistaken remedies occasioned by respondent's wrongful acts did not prevent the accrual of the cause of action for reformation until February 25, 1939, or March 2, 1942.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(As to Limitations.)

I.

The allegations concerning fraud in petitioner's pleading were set up to avoid limitations and laches, under the Missouri rule as outlined in Section 1031.

The basis of the action is contract, and not fraud, so that Section 1014 has no application to bar the action on any ground. (*Turnbull* v. *Watkins*, 2 Mo. App. 235, l. c. 239, and *Brack* v. *Cohn-Hall-Marx Co.*, 276 N. Y. 259, show that action was on contract and not on fraud.)

And so the Court of Appeals erroneously selected and applied an inappropriate State limitation statute, contrary to the rule stated in Section 725, Title 28, U. S. C. A., and by this Court in *Guaranty Trust Company* v. *York*, 65 S. Ct. 1464. That decision held that a Federal court must apply a State statute of limitations which bars an action, not a statute which does not bar such action.

By so ruling, the Court of Appeals denied petitioner the equal protection of the law of the State of Missouri, contrary to *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64.

II.

Respondent's pleading failed to specify any section of the Missouri statute of limitations as a bar, and so, under the law of that State as declared in *Gibson* v. *Ransdell*, 188 S. W. 35; *Knisely* v. *Leathe*, 256 Mo. 341; *State ex rel.* v. *Spencer*, 79 Mo. 314; *Murphy* v. *De France*, 105 Mo. 53, and *Canada* v. *Daniel*, 175 Mo. App. 55, the Missouri statute of limitations selected by the Court of

Appeals could not have been applied, even had it been a bar without violating Section 725, Title 28, U. S. C. A.

Had the case been pending in the State Court, three blocks away, the judgment would have been for petitioner instead of respondent, because of failure to plead the section alone. And the lower courts were without jurisdiction to apply the bar of any statute of limitations in this case, not only because no such statute barred the action, but also because no such statute was pleaded. And so the erroneous decision of the Court of Appeals is in conflict with the ruling of this Court in ***Guaranty Trust Co.*** v. ***York***, 65 S. Ct. 1464, and ***Erie R. Co.*** v. ***Tompkins***, *supra*.

III.

Even had petitioner's pleading shown on its face that the case was barred by an unpleaded Statute of Limitations, the Missouri court could only hold that by failure to specify the section it was waived and could not be utilized to bar the action without specifying the section. (*Gibson* v. *Ransdell*, 188 S. W. (2d), l. c. 38.)

And therefore the decision in ***Guaranty Trust Company*** v. *York*, 65 S. Ct., and *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, are in direct conflict with the opinion of the Circuit Court of Appeals herein.

IV.

The Circuit Court of Appeals thought it measured the allegations of fraud set up to anticipate a defense by the rule stated in Section 1014, but it wholly failed to apply the applicable rules authorized by Sections 5844, 1012 and 1031. Therefore it erroneously selected an inapplicable State statute of limitation which did not bar the action. Its decision is therefore contrary to the law

of Missouri and contrary to Section 34, Judiciary Act, 1789, and the decision of this Court in *Guaranty Trust Company* v. *York*, 65 S. Ct. 1464, and is not in accordance with any law, State or Federal.

V.

The opinion of the Court of Appeals failed to note or include the acts of concealment of respondent, supplementing its acts at the trial of the lawsuit in May, 1933, to the effect that it contended that respondent made no sound risk agreement with petitioner, and that respondent knew nothing of any such agreement, and that Denison was not in its employ, and by other statements, which led petitioner to believe that the documents attached to petitioner's application on June 14, 1929, had not been forwarded for approval to the Home Office of respondent, and that Denison did not have authority to negotiate contracts, and therefore petitioner did not know certainly that he had a valid contract, before February 25, 1939.

The benefit of Sections 1031 and 1012 and 5844, which tolled the limitation statute of the State of Missouri, was denied petitioner, contrary to the decision in *Guaranty Trust Co.* v. *York*, 65 S. Ct. 1464.

VI.

The Court of Appeals, in applying the rule applicable to actions on the ground of fraud in Section 1014, to the reformation action grounded on contract and in failing to apply the rules declared in Section 5844 (binding respondent by the statements of Denison both as to law and fact, with reference to the terms, benefits and advantages of the contract of insurance) and in Sections 1012 and 1031—rendered a decision directly in conflict

with the decision of this Court in *Guaranty Trust Company* v. *York*, 65 S. Ct. 1464 and Section 34, Judiciary Act, 1789.

VII.

The physical facts that respondent's policy did not insanity record and that the blank spaces in the printed form of receipt for the first premium (37) were filled in by Denison for $17.70, two dollars less than the amount of the check of petitioner's mother's (Exhibit E 37) (11), coupled with the false representation that Denison (12)

> "* * * was ignorant as to whether defendant intended to charge plaintiff two dollars more in consideration of said waiver and estoppel agreement"

on June 14th, and that Marquis on June 29th (12) appeared and wrote the words "Received two dollars more. M. E. Marquis" (37) thereon, conclusively shows that the contract sought to be reformed was actually made, and that the highly intelligent and most impartial judges we have ever known, except in this case, erred in stating in their order, with the appellant judges' approval, dismissing the case (50):

> "It is difficult to avoid thinking that the plaintiff individually (not his learned and highly esteemed counsel) has set out to harass both the defendant and the courts"

and that (49)

> "Twice the Court of Appeals not only refused to resurrect it, but almost spat on the grave,"

which latter statement was based on the statement in the opinion of the Circuit Court of Appeals in ***Kithcart*** v.

Metropolitan Life Insurance Company, 88 Fed. (2d) 407, 411, wherein said court said:

> "The bill of complaint is wholly **without merit,** and in view of the record in the original case, ***it is a strain upon the credulity of the court to believe that*** *it was brought in good faith.*"

And which court in said opinion from the facts then known to and alleged by petitioner also decided that Denison was without authority to bind respondent by his conversations and misrepresentations. Said statements established denial of due process.

(As to Jurisdiction.)

I.

The reformation suit was not a controversy "wholly between citizens of different States," but between petitioner, "*a citizen and resident* of the State of Missouri *and the United States of America*" and respondent, a New York corporation engaged in the business of "insuring citizens and residents of the United States, resident in Missouri" (3); and therefore was not removable under Section 28, Judicial Code.

II.

The command of the XIVth Amendment that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" guaranteeing a United States citizen not only the right to "institute," but to "maintain" the reformation suit in the courts of his own state or any other, is in conflict with and destroys the command of Section 29, Judicial

Code, providing that when a nonresident defendant files a petition and bond to remove "* * * it shall then be the duty of the State court * * * to proceed no further." Said Section 29 is therefore void because it purports to compel a state to disobey the Supreme law (clause 2, Article VI, Constitution U. S.).

III.

The privileges and immunities secured by Section 2 of Article IV of the original Constitution included "the right of a citizen * * * to institute and *maintain* actions of any kind in the courts of the State." (*Corfield* v. *Coryell*, Fed. Case No. 3230).

> "The 'privileges and immunities' secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.
>
> "'But the Fourteenth Amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired'."

Slaughter House Case No. 8,408, per Justice Bradley.
Colgate v. *Harvey*, 296 U. S. 428.

> "And while the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship."

Colgate v. *Harvey*, 296 U. S. 427.
Arver v. *United States*, 245 U. S. 366, 377, 388, 389.

"'By the original constitution, citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. * * * and citizenship in a state is a result of citizenship in the United States'."

United States v. *Hall*, Fed. Cas. No. 15,282.

IV.

The XIVth Amendment compelled Missouri to accord to petitioner the same privileges and immunities as it must accord to a citizen of any other state, and included in such privileges and immunities is the right not only to institute but to maintain any action in the State court granted to petitioner by said clause of the XIVth Amendment.

Therefore, the State of Missouri did not lawfully obey the Act of Congress commanding it to proceed no further in petitioner's suit for reformation, because by doing so Missouri disobeyed the command of the privileges and immunities clause of the XIVth Amendment.

V.

The Slaughter House cases recognized that a citizen of the United States is guaranteed the right of access to the courts of the states by the XIVth Amendment, which, of course, means the right to institute and maintain actions in said courts. (16 Wall. 36.)

VI.

The Constitution, providing that the judicial power should extend to controversies between citizens of different states, did not disturb the concurrent jurisdiction of State and Federal courts with reference to said contro-

versies, in accordance with principles stated by Hamilton in his Federalist No. LXXXII, when he said:

> "The principles established in a former paper (No. 32) teach us that the States will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible."

VII.

And so the rule as to concurrent jurisdiction stated in *Harkrader* v. *Wadley*, 172 U. S. 148, l. c. 164, prevented the removal of any case of which the State court had concurrent jurisdiction with the Federal court to the Federal court. That rule is thus stated:

> "When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

Hamilton, even before the adoption of the IXth and Xth Amendments, recognized that the only way a case of which a State court had concurrent jurisdiction could have the judicial power of the United States extended to it was by an appeal, as pointed out in his Federalist LXXXII:

> "And this being the case, *I perceive at present no impediment to the establishment of an appeal from*

> *the state courts, to the subordinate tribunals;* and many advantages attending the power of doing it may be imagined. *It would diminish the motives to the multiplication of federal courts* and would admit of arrangements calculated *to contract the appellate jurisdiction of the Supreme Court.* The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the state courts, to district courts of the Union."

VIII.

The statement of Judge Wright in *Teal* v. *Felton,* 12 How. 284, 13 L. Ed. 900, l. c. 292, as follows:

> "After citing the 2d section of the 3rd article of the Constitution, he adds, '*This is a mere grant of jurisdiction* to the federal courts, and limits the extent of their power, *but without words of exclusive or any attempt to oust the State courts of concurrent jurisdiction* in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the State courts but to define the limits of those granted to the federal judiciary,"

coupled with the language of Chief Justice Marshall in *Hodgson* v. *Bowerbank,* 5 Cranch 303:

> "Turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution,"

conclusively establishes the truth that, since the Constitution did not oust the State courts of that concurrent jurisdiction which it thus retained, then the Congress could not go beyond the Constitution and deprive them of that concurrent jurisdiction by the removal acts.

IX.

The District Court made the following statement in its memorandum and order of dismissal (49, 50):

> "This venerable controversy haunts us like a ghost which cannot be laid. Once our colleague put an end to it. Twice we buried it. Twice the Court of Appeals not only refused to resurrect it, but almost spat on the grave. Here it comes again (49).
>
> * * * * * * *
>
> "2. We shall sustain the motion to dismiss on the second ground set out in the motion, that the amended petition shows on its face, when supplemented by facts of which judicial knowledge is taken, that the controversy presented is *res adjudicata* (50).
>
> * * * * * * *
>
> "It is difficult to avoid thinking that the plaintiff individually (not his learned and highly esteemed counsel) has set out to harass both the defendant and the courts" (50).

The only matter in the record justifying the finding of the District Court that the Circuit Court of Appeals "almost spat on the grave" of the case was its statement that "it is a strain upon the credulity of the court to believe that it (petitioner's suit) was brought in good faith." (88 Fed. (2d) 411).

As to whether said statements disqualified the District court, through prejudice against petitioner and in favor of respondent, to render any judgment in the case, and operated to deny petitioner due process, is a question now submitted. (See *Tummey* v. *Ohio*, 273 U. S. 510; *Morgan* v. *United States*, 304 U. S. 1; *Whitaker* v. *McLean*, 118 Fed. (2d) 596, where the disqualifying remarks during a trial disqualified the judge and rendered his judgment void.)

The State of Missouri holds that prejudice by a judge

against a party causes the court to lose jurisdiction, and that prohibition lies against the judge. (*State* v. *State*, 278 Mo. 570, l. c. 582-583).

Two judges who sat when their opinion questioned petitioner's good faith (88 Fed (2d) 411) concurred in the opinion against petitioner herein.

In *Oakley* v. *Aspinwall*, 3 N. Y. 547, it was said:

> "* * * the first idea in the administration of justice * * * is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause."

A trial by a biased official is not in accordance with due process. (*Tummey* v. *Ohio*, 273 U. S. 510, 50 A. L. R. 1243; *Morgan* v. *United States*, 304 U. S. 1). And so the petitioner was denied the benefit of the Due Process provision of the Fifth Amendment.

X.

The reasons justifying the diversity of citizenship jurisdiction, as outlined in *Guaranty Trust Co.* v. *York*, 65 S. Ct. 1464, *Gaines* v. *Fuentes*, 92 U. S. 10, and *Bank of United States* v. *Deveaux*, 5 Cranch 303, as expressed in *Gaines* v. *Fuentes*, is:

> "* * * had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts."

The record herein discloses that, as to the federal courts, the principle has worked in reverse order.

So that the question of validity of the removal acts

is a most serious question to the parties and the administration of justice in this case.

XI.

The Circuit Court of Appeals denied the Constitutional guarantee of rights and immunities to petitioner which insured to him the privilege of having those rights and immunities judicially declared and protected, by ignoring the allegations of petitioner's pleading referred to in Reason No. IV and substituting therefor the statement that

> "* * * he, *as a resident of Missouri*, has chosen to bring the action in the courts of his own State,"

and deciding that the controversy is not between petitioner as a citizen of the United States and respondent, a mere New York corporation, which contracted with petitioner in that capacity and that respondent's rights were governed by the principles quoted from *Gaines* v. *Fuentes*, 92 U. S. 10; whereas said case solely involved local prejudice and influence in a controversy between citizens of different States, as stated on page 11 of petitioner's reply brief in said Circuit Court of Appeals as follows:

> "Appellee fails to answer the point that Mr. Kithcart, as a citizen of the United States, cannot be deprived of his fundamental privilege to maintain this suit in the state court.
>
> "The authorities on which appellee relies deal only with citizens of different states and not United States citizens.
>
> "Also said authorities are based on statutes enacted before the adoption of the XIVth Amendment, or cases based on principles stated in said authorities."

The District Court fell into a similar error.

The failure of the lower courts judicially to declare and protect petitioner's rights in the premises as a citizen of the United States denied to him the Constitutional guarantee of rights and immunities insuring petitioner the privilege of having those rights and immunities judicially declared and protected. (*Lawrence* v. *State Tax Commission*, 286 U. S. 276.)

XII.

Former Judgments Not *Res Judicata*.

Judgments in previous litigation were rendered in cases where petitioner misconceived or was mistaken in his remedy, and merely establish that reformation is necessary before petitioner can recover on his insurance contract.

Petitioner's misconception of his remedy in the litigation preceding this action for reformation did not thereby render the judgments in such misconceived actions *res judicata*. (*Wilson & Co.* v. *Hartford Fire Ins. Co.*, 300 Mo., l. c. 1; *Troxell* v. *Railway*, 227 U. S. 434, l. c. 442; *Brown* v. *Fletcher*, 182 Fed. 963; *National Surety Co.* v. *Jenkins*, 18 Fed. (2d) 707; *De Solar* v. *Hanscombe*, 158 U. S. 216; *Paper Products Co.* v. *Life Ins. Co.*, 204 Mo. App. 527; *Northern Assurance Co.* v. *Grandview Building Ass'n*, 203 U. S. 106, followed in *Baumhof* v. *Railway*, 205 Mo. 268; *Equitable Safety Ins. Co.* v. *Hearne*, 20 Wall. 294.)

The "subject matter" in the prior suits was *on the policy alone* (74), while the subject matter of this suit is the *actual insurance contract as made*. Hence the rule applies that

> "The record of a former suit between the same parties is not conclusive unless the subject matter passed on in the former suit be the same with the dispute in the case at bar." (*Clemens* v. *Murphy*, 40 Mo. 121; *State* v. *James*, 82 Mo. 509).

The failure of the Court of Appeals to decide the question as to *res judicata* denied to petitioner a right well described by this Court in *Lawrence* v. *State Tax Commission*, 286 U. S., l. c. 282:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise assures him of the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked."

The fact that petitioner did not cross-appeal prevented the Court of Appeals from having jurisdiction to raise the question of the Statute of Limitations itself. (*Maryland Casualty Co.* v. *Morley Construction Co.*, 300 U. S. 227.) This also applies to the failure of both courts to take notice of and decide the question as to whether petitioner's right as "a citizen of the United States" to maintain the suit in the State court under the XIVth Amendment was violated by removal to the Federal District Court and deciding said question on the theory that the case was between citizens of different states.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this Court be directed to the United States Circuit Court of Appeals for the 8th Judicial Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 13008, Civil, Boyd L. Kith-

cart, Appellant, vs. Metropolitan Life Insurance Company, a Corporation, Appellee, to the end that cause may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated October 18, 1945.

PAUL E. BINDLEY,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is not yet reported and is at pages 74 to 82 of the record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is July 31, 1945.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are as follows: Sec. 347, 28 U. S. C. A., providing:

> "* * * In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938.)

3. And also Section 377, 28 U. S. C. A., providing:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute,

which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

III.

Statement of the Case.

This has already been stated in the preceding petition (pages 1 to 37). It is hereby adopted and made a part of this brief.

IV.

Specifications of Errors.

1. The court erred in holding that the judge of the trial court committed no error in rendering a judgment dismissing plaintiff's case for a wrong reason, and in holding it was barred by a statute of limitation not pleaded by respondent and which had no application to the case or action.

2. The court erred in holding that petitioner had no right to recover on Count I of the petition.

3. The court erred in holding that petitioner had no right to recover on Count II of the petition.

4. The court erred in holding that Sections 71 and 72, Title 28, U. S. C. A., were valid and that the federal court had jurisdiction.

5. The court erred in holding that petitioner's action was barred by virtue of the limitation provisions of Sections 1013 and 1014, R. S. Mo. 1939.

6. The court erred in failing to hold that respondent's improper acts within the meaning of Sections 1031 and 1012, R. S. Mo. 1939, had prevented petitioner from com-

mencing his action for reformation before February 25, 1939, and March, 1942.

7. The court erred in holding that Section 72, Title 28, U. S. C. A., in providing that after a petition and bond for removal were filed by a nonresident of Missouri, then that "the State court shall proceed no further in such suit," because said command of the statute by the Congress was a command to the State of Missouri to deny to petitioner the right to maintain his suit in the State court after having instituted it therein, which act of the State of Missouri through its court was prohibited by the privileges and immunities provision of Section 1 of the XIVth Amendment.

8. The court erred in holding that Congress was authorized to enact a law compelling the State of Missouri to deny to petitioner the fundamental right to maintain his suit in the court of the State, which right was secured to petitioner as a citizen of the United States, by the privileges and immunities clause of the XIVth Amendment.

ARGUMENT.

The reasons given in the petition for the writ so plainly state the position of the petitioner and show his right to have the writ prayed for that he waives argument except as follows:

Argument.

I.

The rule in equity which prevented the principle of laches from barring relief is preserved in Section 1031, **R. S. Mo. 1939, with reference to the improper acts of a defendant preventing commencement of an action. And consequently neither limitations nor laches has any application to this case in view of the fact that petitioner, instead of consenting or acquiesing in respondent's wrong, has been most diligent in his futile chase of mistaken remedies.**

This Court, in *Bogert* v. *Southern Pacific*, 250 U. S. 1099, has held that such futile efforts by a plaintiff, resulting in 18 mistaken suits and the lapse of 22 years, did not bar a recovery against the defendant in that case.

This Court has also, in *Order of R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342-349, held that, l. c. 348:

> "A State statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period."

The fact that the federal courts questioned petitioner's good faith does not justify his defeat herein.

The Court of Appeals in its opinion said:

> "The petition attempts to escape the general statute of limitations and to bring itself within the special statute Mo. R. S. A., Section 1014, which allows an action for relief on the ground of fraud to be instituted within five years after the accrual of the right. The cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud."

Said language, on its face, discloses that said statute is applicable only to an action founded on fraud.

The action herein is based on contract. It seeks to reform a contract. The allegations concerning fraud were not set up as a cause of action, but, under the Missouri rule, to avoid limitations and laches.

The further statement in the preceding part of the opinion, that the action is barred by Section 1013, discloses that said Section 1013 deals with instruments in writing, or contracts. Sec. 1031 applies where improper acts "prevent the commencement of an action" whether founded on "fraud" under Section 1014 or on contract under Section 1013. See *Scott* v. *Arnold,* 2 Mo. 13; *Foley* v. *Jones,* 52 Mo. 64; *Harper* v. *Pope,* 9 Mo. 402; *Butler* v. *Lawson,* 72 Mo. 227 (where an action was filed forty years after a wrong was done and was timely; *Citizens Bank of Festus* v. *Frazier,* 177 S. W. (2d) 477.

In *Turnbull* v. *Watkins,* 2 Mo. App. 235, the exact question here presented was decided, where the court said, l. c. 239:

> "It is argued that the petition presented a case, not for breach of contract, but for an alleged fraud; that therefore the limitation of five years attached to the demand, so that the plaintiff's instructions were improper, and the defendant's ought to have been

given. It is true that the petition alleges fraud, and attempts, apparently, to evade the five-years limitation by declaring that plaintiff first discovered the fraud five years prior to the commencement of the suit. But the basis of the action is manifestly the written contract framed with the receipt given to Shaffner. But for that, there would be no right of recovery at all. Plaintiff's taking up of the bill, through Whittelsey, would have been treated as a voluntary payment, excluding any claim for redress. But, with the written contract, this feature becomes an item of damages for the breach thereof. It performs no other office here, though attended with an alleged deceit practiced by the defendant. The court, therefore, did not err in refusing to apply to the claim sued on the statutory limitation of five years."

The authorities in other States are the same. (*Brick* v. *Cohn-Hall-Marx Co.,* 276 N. Y. 259; *Missouri Savings & Loan Co.* v. *Rice,* C. C. A. 8, 84 Fed. 131; *Gregory* v. *Williams,* 189 Pac. 932; *Ross* v. *Saylor,* 39 Mont. 559, which involved an oral contract and the court held that it was an action on contract and not on fraud.)

So that the discussion on pages 78 and 79 with reference to Section 1014 has no application whatsoever. And, in view of the fact that an improper act under Section 1031 may prevent the commencement of an action even without the fraudulent intent present in this case (*Harris* v. *Pope,* 9 Mo. 402), it is apparent that the Circuit Court of Appeals rendered a decision in conflict with the decision of this Court in *Guaranty Trust Company* v. *York,* 65 S. Ct. 1464, when it affirmed the judgment of the trial court by holding that the suit for reformation was barred by a statute which had no application thereto, and which action resulted from the failure of respondent to plead

any applicable statute of limitations by specifying the section thereof.

The reason that it did not do so was that there was no such statute. And so the decision of the Court of Appeals is in conflict with said decision of this Court. Incidentally, petitioner's pleading in the reformation suit was filed in the State Court and was not filed in the Federal Court and conformed only to State Court rules.

II.

The XIVth Amendment recognizes that a human being is capable of existence in two legal capacities and can be a citizen of two sovereignties. The first sentence is:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

The lower courts ignored the allegations in petitioner's pleading, disclosing that he exists in this case in both of said legal capacities, and that he brought the reformation suit in both of said legal capacities. And while the courts, State and Federal, recognize the distinction between United States citizenship and State citizenship, yet the lower courts in this case treat the distinction which the Constitution makes as nonexisting, and also disposed of the removal question by deciding that a United States citizen lost his permanent existence as such in the subordinate personality of a citizen of a State.

To state the question or proposition is to demonstrate the error of the lower courts on this question in this case. It was necessary for the lower courts in this case, if they would sustain the validity of the removal acts and their

own jurisdiction, to write out of the XIVth Amendment the provision that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States."

It was also necessary to write out the allegation of petitioner's United States citizenship from his pleading. But it is there (3). It was also necessary for the lower courts to write out of the XIVth Amendment the second clause thereof as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Because they denied to petitioner, under the acts of Congress involved, the rights secured to him by said quoted provisions, all they left in the XIVth Amendment was the following words of the first sentence

> "* * * and of the State wherein they reside."

By the ruling of the Court of Appeals on limitations, petitioner was denied the equal protection of the laws secured by the XIVth Amendment; and by reason of the prejudice evidenced by the statements in the record, the due process provision of the Vth and XIVth Amendments was denied.

Ought not the foregoing to be a complete answer to the idea that the removal statutes, as applied to this petitioner in his capacity as a citizen of the United States, were effective to give the lower courts jurisdiction?

III.

But even as to citizens of different States, the removal acts involved herein are void at least where the controversy involves no federal question.

It is true, the Constitution provides that the judicial power shall extend to controversies between citizens of different States. But the Constitution does not deny the State courts power to entertain jurisdiction of controversies between citizens of different States. It merely authorizes litigants of different States who have such controversies to invoke the judicial power of the United States by instituting suits in courts to which the judicial power may properly extend, to-wit, the Federal Courts. It does not prevent citizens of different States from instituting suits in any court in which they can obtain jurisdiction of their opponents.

A citizen of any State of the United States who finds a citizen of any other State against whom he has a claim may institute a suit against him in any court on earth. The fact that it was so mentioned in the Constitution did not prevent petitioner herein from suing respondent in Canada, in which dominion it operates. This is true as to all the countries south of the Rio Grande, and as to all of the countries east of the Atlantic and west of the Pacific if respondent could there be found. And the provision in the Constitution could not in any way avail either litigant, or enable either to extend the judicial power to such controversy.

And when the Constitution was adopted it was a Constitution adopted by sovereign States, each of which was then exercising sovereign power, and in virtue of such sovereign power exercised jurisdiction over controversies between citizens of different States and the Nation, or any

person who might choose to become a suitor in the court of any State. When the Constitution was adopted it contained in it, and on its face, all the powers which the States delegated through it to the United States, and no power was granted to the United States unless it was granted to it after the fashion described by this Court in *Claflin* v. *Housman*, 93 U. S. 130, when it adopted the statement on that subject by Alexander Hamilton in the LXXXII number of the Federalist.

And while there the subject being discussed was the concurrent jurisdiction of cases arising under the Federal Constitution and laws: Yet the same principle applies to the question now being discussed. And this Court there pointed out that exclusive delegation of authority to the Federal Government can arise only in one of three ways:

> "* * * Either by express grant of exclusive authority over a particular subject; or by a simple grant of authority, with a subsequent prohibition thereof to the States; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the States; he says that these principles may also apply to the *judiciary* as well as the legislative power. Hence, he infers that the State courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes."

Mr. Hamilton, of whom this Court in the above case said, with reference to his examination of concurrent jurisdiction of the State and Federal Courts:

> "It was fully examined in the 82nd number of The Federalist, by Alexander Hamilton, with his usual analytical power and farseeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate."

In his LXXXII number Mr. Hamilton points out that his remarks in his number XXXII of the Federalist, dealing with the sovereignty of the States, applied also to the judiciary. There he said:

> "And this being the case, *I perceive at present no impediment to the establishment of an appeal from the state courts, to the subordinate tribunals;* and many advantages attending the power of doing it may be imagined. *It would diminish the motives to the multiplication of federal courts* and would admit of arrangements calculated *to contract the appellate jurisdiction of the supreme court.* The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the supreme court, may be made to lie from the state courts, to district courts of the union." (Italics ours.)

This Court itself, in the case of *Teal* v. *Felton,* 12 How. 284, 13 L. Ed. 900, l. c. 292, expressly declared that the provision of the Constitution providing for the vesting of the judicial power and its extension to certain cases or controversies, did not oust, or attempt to oust, any State Court of the concurrent jurisdiction which existed in the States at the time of the adoption of the Constitution. And consequently the statement of Chief Justice Marshall in *Hodgson* v. *Bowerbank,* 5 Cranch 303, now applied to the question here involved, would end the controversy in favor of petitioner. For the Chief Justice there said:

> "Turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution."

Where can the Court find anything in the Constitution justifying an artificial person of another State, at its

mere desire, by the exercise of its discretion or whim to deprive a court of a sovereign State of its attribute of sovereignty, to-wit: the jurisdiction of one of its courts to do justice as it had done before the adoption of the Constitution?

IV.

The Court will note that in *Cohen* v. *Virginia*, 6 Wheaton 264, in justifying the application of Section 25 of the Judicial Code to State Courts, Chief Justice Marshall called attention to the fact that the Continental Congress and the Confederation had approved appeals to the National courts from the courts of the States in many cases, and therefore concluded that it was the intent of the Convention to make the rules which were applicable to the courts of the States before the Constitution was adopted applicable under the Constitution on the question of appellate jurisdiction. The language in *Cohen* v. *Virginia* demonstrates that never before that time had any action been transferred from any State court to any national court, and consequently the rule by virtue of which the Chief Justice held the Constitution extended judicial power by the appellate method to the State courts would not apply with reference to removal to courts of original jurisdiction.

In *Cohens* v. *Virginia*, in justifying the extension of the judicial power by writ of error to the judgment of a court of a State wherein a federal right was involved, the court said, l. c. 417:

> "Previous to the adoption of the confederation, Congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government, to establish

tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts, to which the judicial power of the federal government extended.

The confederation gave to Congress the power 'of establishing courts for receiving and determining finally appeals in all cases of captures.'

This power was uniformly construed to authorize these courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation than under the present constitution; and the states being much more completely sovereign, their institutions were much more independent."

Chief Justice Marshall found it necessary to refer to the fact that appeals from State to National courts were authorized by the Continental Congress and by the Articles of Confederation to justify the extension of the judicial power of the United States by the appellate method to final judgments of the courts of the States. No such precedent exists to justify the enactment of the removal statutes here involved, for that method was never used before the adoption of the Constitution. But that method could be applied to all cases enumerated in the 3rd article of the Constitution if it can be applied to diversity of citizenship cases. And, as pointed out in *Cohens* v. *Virginia*, l. c. 422, *infra*, if the judicial power could be extended to all cases enumerated in the 3rd article of the Constitution, it would result in a complete consolidation of the States.

In *Cohens* v. *Virginia*, 6 Wheaton 264, l. c. 384-385, in discussing the extent of the judicial power, Chief Justice Marshall pointed out that it should be coextensive with legislative power, and in effect declared that the standard of sovereignty applied by Hamilton in his number XXXII of the Federalist to the concurrent power of State and Union to tax applied to the judicial departments of both sovereignties, saying:

> "* * * the judicial power of every well-constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.
>
> If any proposition may be considered as a political axiom, this, we think, may be so considered."

The above language of the Chief Justice, if applied to the State governments, would destroy the diversity jurisdiction by removal, for if

> "* * * the judicial power of every well constituted (State) government must be coextensive with the legislative (power of the State) and must be capable of deciding every judicial question which grows out of the Constitution and laws (of the State),"

then how can the diversity (concurrent) jurisdiction of the courts of the States to decide

> "every judicial question which grows out of the Constitution and laws (of the State)"

after it has attached to any case be divested by a mere act of Congress giving a non-resident a right to deprive the State court of the power of deciding every such judicial question?

Since the above is a political axiom that must be applied to

"every well constituted (State) government,"

does not the application of that axiom destroy the diversity jurisdiction of the federal courts acquired by way of removal?

In discussing the question of concurrent jurisdiction of State and Nation, Hamilton, in his No. 32 of the Federalist, which in No. 82 he applied to the judiciary, said:

> "The necessity of a concurrent jurisdiction in certain cases, results from the division of the sovereign power; and the rule that *all authorities*, of which the states are not *explicitly divested* in favour of the union, *remain with them in full vigour*, is not only a theoretical consequence of that division but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We there find, that notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the states, *to insert negative clauses prohibiting the exercise of them by the states.* The *tenth section of the first article consists altogether of such provisions.* This circumstance is a clear indication of the sense of the convention, and furnishes a *rule of interpretation out of the body of the act*, which justifies the position I have advanced, and refutes every hypothesis to the contrary."

But in *Cohens* v. *Virginia* the court pointed out that the Constitution never contemplated that the judicial power of the United States could be extended to all cases enumerated in the third article of the Constitution, for that would result in a complete consolidation of the States with reference to judicial power, saying, l. c. 422:

> "If it shall be established, he says, that this court has appellate jurisdiction over the state courts in all

cases enumerated in the 3d article of the constitution, a complete consolidation of the states, so far as respects judicial power, is produced.

But, certainly, the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. 'A complete consolidation of the states, so far as respects the judicial power,' would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all."

In his No. 32 of the Federalist Alexander Hamilton discusses the same proposition with reference to the legislative powers of States and Nation as follows:

"An entire consolidation of the states into one complete national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union; and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*."

It thus appears that the judicial power of the United States, insofar as its appellate feature was involved, could not be extended to diversity jurisdiction cases simply because of the diversity of citizenship. Before the judicial power involved in the appellate jurisdiction could be extended to such case, the jurisdiction of a State court over a federal question must be raised in the record. For a like reason, as to diversity cases, judicial power of the United States cannot be extended by the removal method to a diversity of citizenship case involving no federal question instituted in a State court. Otherwise, removal is based, not upon the proposition that any federal question is involved, and not for the reason that any question of local prejudice is involved, but for the sole reason that the nonresident desires to deprive the State court of its jurisdiction and to vest jurisdiction in a federal court in a case where no federal question is involved.

The statement in *Guaranty Trust Company* v. *York*, 65 S. Ct. 1464, to the effect that:

> "* * * since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, *only another court of the State*, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State,"

would seem to get perilously close to the danger referred to in his Federalist number 32 by Hamilton, and at page 422 in *Cohens* v. *Virginia* by Marshall, with reference to an entire consolidation of the States into one complete national sovereignty, either through the legislature or through the judiciary, and hence would destroy that federalism which is the desire of this Court to preserve, as pointed out in *Guaranty Trust Co.* v. *York, supra.* For, if

in a diversity of citizenship case the federal court be only another State court, then what becomes of the time-honored principle so essential to that federalism stated in *Claflin* v. *Houseman,* 93 U. S. 130, l. c. ....., as follows:

> "It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman* v. *Booth,* 21 How. 506, 16 L. Ed. 169; and hence the State Courts have no power to revise the action of the Federal Courts, nor the Federal the State, except where the Federal Constitution or laws are involved."

We respectfully submit that the solution of the entire difficulty is well stated by this Court in *Claflin* v. *Houseman, supra,* where, quoting Hamilton, it says:

> "Here another question occurs: what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, *that an appeal would certainly lie from the latter, to the Supreme Court of the United States.*"

It follows that the solution of the entire problem would be to recognize the truth, that the removal acts with reference to diversity cases, and perhaps all cases of which a State court has concurrent jurisdiction with the federal court, are void and can confer no jurisdiction on any federal court of any case properly instituted in a State court having jurisdiction thereof until "its duty is fully performed and the jurisdiction involved is exhausted."

The opinion in *Cohens* v. *Virginia* thus discloses that, had the judicial power of the United States been extended to all those cases enumerated in the 3d Article of the Constitution, it would result in a complete consolidation of the States so far as concerns judicial power.

The statement in the opinion in *Guaranty Trust Co. of New York* v. *York,* to the effect that in a diversity of citizenship case a federal court is merely another court of the State, is a decision which, if followed to its logical conclusion, must result in a complete consolidation of the States so far as respects judicial power.

And so we call attention to the opinion in *Cohens* v. *Virginia,* so that it may now have that effect which it had at another day and time on the destiny of this Nation.

In Beveridge's Life of John Marshall, Vol. 4, pp. 343, 344, it is said:

> "The opinion of John Marshall in the Cohens case is one of the strongest and most enduring strands of that mighty cable woven by him to hold the American people together as a united and imperishable nation.
>
> "Fortunate, indeed, for the Republic that Marshall's fateful pronouncement came forth at such a critical hour. * * *
>
> "Could John Marshall have seen into the future he would have beheld Abraham Lincoln expounding from the stump to the farmers of Illinois, in 1858, the doctrines laid down by himself in 1819 and 1821."

As the opinion in *Cohens* v. *Virginia* materially contributed to preserve this Nation from disunion in that day, we respectfully submit that its application to the issues herein will prevent the threatened consolidation of the States which may result from the decision of this Court in holding that, in a diversity case, the federal court is merely another court of the State.

V.

The following resume of the effect of the privileges and immunities clause of the XIVth Amendment is respectfully submitted.

In *Corfield* v. *Coryell,* Fed. Cas. No. 3230, Justice Washington, discussing the meaning of privileges and immunities as set out in Article IV, said:

> "We feel no hesitation in confining these expressions (in the Constitution) to those privileges and immunities which are in their nature fundamental; which belong, of right, to the citizens of all free government; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and to obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen * * * to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal; * * * may be mentioned as some of the privileges and immunities of citizens which are clearly embraced by the general description of privilege deemed to be fundamental."

Among the rights of which petitioner was deprived was the right to *maintain* this action, as it was his right to "institute" it. This is a fundamental right, referred to in *Corfield* v. *Coryell,* 4 Wash. 371.

The State Court in *Mining and Milling Co.* v. *Fire Insurance Company,* 267 Mo. 524, l. c. 585, said:

> "The clear purpose of all of our statutes when taken together was to give full force and effect to

said Section 10 of Article 2 of the Missouri Constitution, which provides that,

'The courts of justice shall be open to *every person.*' Not a part of them. Not to the citizens or residents of Missouri only, nor to the citizens of the United States only, but to all persons of the world who demand justice at the hands of our courts against any one who may be found within the jurisdiction of this state, whether resident, nonresident, individual or corporation. This is perfectly clear from the reading of that section of the Constitution which says *every person* may sue. Not only that, but the same section further provides that 'certain remedy' (shall be) afforded *for every injury to person, property or character,* etc. This provision is not limited to *some of the injuries* that have or may be done to the person, property and character of those mentioned in the preceding clauses, but by clear and unambiguous words includes *every one of the character mentioned.*'' (Italics court's.)

That court in said case, at l. c. 592, quotes from *Chambers* v. *Railroad,* 207 U. S. 142, in which case, at l. c. 148, it is said:

''In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to *sue* and *defend* in the courts is the alternative of force. In an organized society *it is the right conservative of all other rights,* and lies at the foundation of orderly government. It is one of the *highest and most essential privileges of citizenship,* and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but *is granted and protected by the Federal Constitution. Corfield* v. *Coryell,* 4 Wash. C. C. 371, 380, Fed. Cas. No. 3230, per Washington, J.; *Ward* v. *Maryland,* 12 Wall. 418, 430, 20 L. Ed. 449, 452,

per Clifford, J.; *Cole* v. *Cunningham,* 133 U. S. 107, 114, 33 L. Ed. 538, 542, 10 Sup. Ct. Rep. 269, per Fuller, Ch. J.; *Blake* v. *McClung,* 172 U. S. 239, 252, 43 L. Ed. 432, 437, 19 Sup. Ct. Rep. 165, per Harlan, J." (Italics ours.)

In the opinion of Mr. Justice Harlan in that case, after quoting *Corfield* v. *Coryell,* the following language is used, l. c. 155:

> "Among the particular privileges and immunities which are clearly to be deemed fundamental, the court in that case specifies the right '*to institute and maintain actions of any kind in the courts of the state*'."
> Quotation and italics by Justice Harlan.

In *McKnett* v. *Railway,* 292 U. S. 230, l. c. 233, the court approved *Corfield* v. *Coryell, saying*:

> "The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *Corfield* v. *Coryell,* 4 Wash. C. C. 371, 381, Fed. Cas. 3230. Compare *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553, 64 L. Ed. 713, 40 S. Ct. 402."

In *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553, l. c. 560, the court said:

> "This court has never attempted to formulate a comprehensive list of the rights included within the 'privileges and immunities' clause of the Constitution (Art. 4, Sec. 2), but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1825, in *Corfield* v. *Coryell,* 4 Wash. C. C.

371, 380, Fed. Cas. 3230 (the first federal case in which this clause was considered), saying: 'We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental.' *Slaughter House Cases*, 16 Wall. 36, 75, 21 L. Ed. 394, 408; *Blake* v. *McClung*, 172 U. S. 239, 248, 43 L. Ed. 432, 435, 19 Sup. Ct. Rep. 165; *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 155, 52 L. Ed. 143, 149, 28 Sup. Ct. Rep. 34. In this Corfield case the court included in a partial list of such fundamental privileges, 'the right of a citizen of one state * * * to institute and maintain actions of any kind in the courts of another'."

It is true that the courts in the foregoing cases do not discuss the XIVth Amendment, but only Clause 2 of Article IV. However, Section I of the XIVth Amendment reversed the order of things existing before its adoption, and as a result thereof citizenship in a state is a result of citizenship in the United States. In *United States* v. *Hall*, Fed. Cases No. 15282, it is said:

> "By the original Constitution, citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed * * * and citizenship in a state is a result of citizenship in the United States."

Mr. Justice Bradley, in the Slaughter House Case, Fed. Cas. No. 8408, said:

> "The privileges and immunities secured by the original Constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.
>
> But the Fourteenth Amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens

or any others. It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired."

In *Bradwell* v. *Illinois*, 16 Wall. 130, it is said:

"There are certain privileges and immunities which belong to a citizen of the United States as such; otherwise, it would be nonsense for the Fourteenth Amendment to prohibit a state from abridging them."

In discussing the effect of the XIVth Amendment, Chief Justice White, in *Arver* v. *United States*, 245 U. S. 366, pointed out that the XIVth Amendment

"* * * broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative * * *."

These authorities are cited with approval by the Supreme Court in *Colgate* v. *Harvey*, 296 U. S. 403-404.

The only privilege created by Section I of the XIVth Amendment is that vested in a United States citizen to become a citizen of any state in which he resides. In the Slaughter House cases, 16 Wall. 80, it is said:

"One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state."

Since, therefore, Mr. Kithcart is a citizen of the United States, and since citizenship in Missouri is a privilege conferred by Section I of the XIVth Amendment, it fol-

lows that any act of the State of Missouri which abridges any right he has as such citizen of Missouri likewise abridges any right he has as a citizen of the United States.

Another privilege referred to in Slaughter House cases which is guaranteed by the XIVth Amendment is

> "• • • the right of free access to • • • the • • • courts of justice in the several states."

This, under the foregoing authorities, of course, includes the courts of the state of which the United States citizen is a citizen.

Senator Howard of Michigan presented the XIVth Amendment to the Senate of the United States on May 23, 1866. He was a member of that reconstruction committee which had formulated the Civil Rights Bill of 1866, and which committee were fearful it might be held unconstitutional, or repealed by some succeeeding Congress, and hence they offered the XIVth Amendment to secure by the Constitution what they regarded as a declaration of the fundamental rights of citizens of the United States. Amongst other things, the Civil Rights bill provided that citizens

> "• • • shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property, and shall be subject to like punishments, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."
>
> (Flack, The Adoption of the Fourteenth Amendment, p. 20.)

Flack speaks of Senator Howard further at pages 84-85:

> "He spoke at considerable length as to the purpose and effect of the first section, saying that it was a general prohibition upon the 'states, as such, from abridging the privileges and immunities of the citizens of the United States.' The privileges and immunities spoken of, he declared, were those belonging to 'citizens of the United States, as such, and as distinguished from all other persons not citizens of the United States.' These privileges and immunities had never been defined, and it was not his purpose, he said, to undertake to define all of them, though he regarded those spoken of in section two of the Fourth Article of the Constitution as being among them. He quoted the decision of Justice Washington in *Corfield* v. *Coryell* (4 Washington Circuit Ct. Repts., p. 380) *to show what some of those privileges were.* The court did not, in that decision, undertake to enumerate all the privileges and immunities secured by that section, but said that they might be included under the following general heads: 'protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, and otherwise; to claim the benefit of the writ of *habeas corpus; to institute and maintain actions of any kind in the courts of the state;* to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by other citizens of the state." (Italics ours.)

Senator Howard, therefore, pointed out that the people incorporated the decision of *Corfield* v. *Coryell* into the

first section of the XIVth Amendment to show that one of the privileges of a citizen of the United States is

> "* * * to institute and *maintain* actions of any kind in the courts of the state."

This same principle has been recognized by the Supreme Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649, where the genesis of the XIVth Amendment was under discussion. The Civil Rights Act of 1866, passed at the first session of the Thirty-ninth Congress, began by enacting that citizens of the United States

> "'* * * shall have the same right in *every state* and territory *of the United States* to make and enforce contracts, *to sue, be parties* and give *evidence*.' * * * The same Congress, shortly afterwards, evidently thinking it unwise and perhaps unsafe to leave so important a declaration of rights to depend on an ordinary act of legislation which might be repealed by any subsequent Congress, framed the 14th Amendment to the Constitution."

So that evidently one of the purposes of the XIVth Amendment was to prevent any state or any subsequent Congress from emasculating the declaration in the civil rights act, that citizens of the United States

> "* * * shall have the *same right in every state* and territory of the United States to make and enforce contracts, *to sue, be parties*, and *give evidence*." (Italics ours.)

In Flack, at pages 231-232, is the following language:

> "Mr. Bingham, who drafted the first section of the Fourteenth Amendment with the exception of the first clause, followed Mr. Farnsworth with a very able speech. Probably more weight should be given the utterances of Mr. Bingham as to the interpreta-

tion of that section than to those of any other, and we shall, therefore, give considerable attention to what he said on this occasion.

* * * * * * *

"The last clause of that section meant, he declared, that no State should deny to any one the equal protection of the Constitution of the United States, or any of the rights which it guaranteed to all men, nor should it (the State) deny to anyone any right secured to him by the laws and treaties of the United States or of such State. The first section was declared to be as comprehensive as 'We will sell to no man, will not deny or delay to any man right or justice' of the Magna Charta."

It thus appeared that the same prohibition contained in Section 10 of Article I of the U. S. Constitution, which prevents Missouri from making treaties, granting letters of marque and reprisal, coining money, emitting bills of credit, making anything but gold and silver coin a tender in payment of debts, passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or granting any title of nobility, have no greater force, no greater constitutional vigor than does the first section of the XIVth Amendment prohibiting Missouri from denying to this petitioner his right *to maintain* this suit in the State court. The legislator who wrote the first section of the XIVth Amendment expressly so declared. See Flack, pages 233-234:

"He then proceeded to explain why he had changed the form of the Amendment as first introduced in February. He had taken counsel of Marshall in the hope that 'the Amendment might be so framed that in all the hereafter it might be accepted by the historian of the American Constitution and her Magna Charta 'as the keystone of American liberty.' The decision of Marshall in *Barron* v. *The Mayor and*

City Council of Baltimore, (7 Peters, p. 250) induced him, he declared, to attempt to impose new limitations upon the power of the States by a Constitutional Amendment."

* * * * * * *

"Mr. Bingham then stated that, while re-examining the case of Barron, after his struggle with Congress in February, he had noted and apprehended as never before, certain words used by Marshall in that decision. He quoted the following words used by Marshall in reference to the first eight Amendments: 'Had the framers of these Amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention.' He said he acted upon that suggestion and imitated the framers of the original Constitution. Just as they had said, 'No State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts,' so had he said, in the first section of the Fourteenth Amendment that 'No State shall make or enforce any law,' etc., imitating them to the letter. He then added: 'I hope the gentleman (Mr. Farnsworth) now knows why I changed the form of the Amendment of February, 1866'."

This Court in *Screws* v. *United States,* 89 Law Ed. 1009, has cited and quoted Mr. Flack's work copiously.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that justice be done herein and that the conflicts on the important questions herein involved be corrected, and that to such end a writ of certiorari should be granted, and this Court should review

the decision of the United States Circuit Court of Appeals for the Eighth Judicial Circuit and finally reverse it.

Respectfully submitted,

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(2)

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 564.

BOYD L. KITHCART, PETITIONER,

VS.

METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE GROUNDS CLAIMED FOR JURISDICTION.

The Petitioner invokes the jurisdiction of this court by virtue of its discretionary powers under Sec. 347 of Title 28, U. S. C. A., providing for the granting of writs of certiorari to the various Circuit Courts of Appeals; he also asserts jurisdiction under Sec. 377 of Title 28, U. S. C. A., providing for the issuance of writs not provided for by Statute (See Petition for Certiorari, pp. 38-39).

STATEMENT OF THE CASE.

We feel that petitioner's statement is both incomplete and confusing and we shall, therefore, supplement it. Two printed records have been filed here; the one numbered 13008 is the printed record of the present case in the Circuit Court of Appeals; the one numbered 11880 is the record there in a prior case, parts of which were incorporated into the present record without reprinting, by permission of the Circuit Court of Appeals (69, 70). Figures in parentheses in our brief refer to pages of the present printed record (13008), except that such figures followed by the numerals "11880" refer to pages of such previous record.

This action is the *sixth* in a series of suits by petitioner against respondent (which have consumed a period of fourteen years), all arising out of the issuance to him of an accident insurance policy under date of June 14, 1929. All these actions were formerly pending in the United States District Court for the Western District of Missouri, either under its original jurisdiction or by removal. The District Court in the present case (sustaining respondent's motion to dismiss) took *judicial notice* of all such prior proceedings and ordered them incorporated into the record (50, 51). The appeal was taken from an order sustaining respondent's motion to dismiss (45, 46) the petitioner's "Amended Petition," or Amended Complaint, which covers (without exhibits) 24 pages of the printed transcript (3-26). No request was made for leave to amend, and the Circuit Court of Appeals for the Eighth Circuit affirmed the order of dismissal (150 F. 2d 997).

The motion to dismiss (45, 46) raises three matters: (1) failure to state a claim upon which relief can be

granted; (2) that all alleged issues are *res adjudicata;* (3) laches and the statutes of limitation of Missouri. We consider that all three questions are still definitely in the case and that certain brief chronological references to the facts (including references to the prior proceedings) are necessary to an intelligent understanding of the questions now involved. Much of the so-called "statements" in petitioner's petition and brief is in reality argument, and the language is not accurately confined to the allegations of the pleadings in the various actions. Petitioner assumes as a *fact* (petition (2)) that all prior actions were on *different* causes of action. In our references to prior proceedings the present petitioner may sometimes be referred to as the plaintiff, and the present respondent as the defendant.

On February 2, 1932 (on removal transcript), there was filed in the District Court a suit at law by this petitioner as plaintiff against this respondent as defendant on the accident policy in question, he claiming that total and permanent disability had been caused by an accidental fall directly and independently of all other causes (46-53, 11880). The policy sued on is shown there, and also at pages 27-33 of the present transcript. After an amendment of the petition (53-55, 11880), defendant answered (55-59, 11880), denying the receipt of *notice* of the accident as required by the policy terms, denying the existence of total disability caused directly and independently of all other causes by external, violent, and accidental means and stating that if plaintiff was totally disabled (which it denied) such was caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity (as per the *exclusion* provision of the policy); the answer also contained a general denial (58, 11880). No reply was filed. Trial was had, much evidence was introduced on all the issues, peremptory declarations were

requested by the defendant (embodying these same defenses and no others, 59, 60, 11880) and refused, the jury was *fully charged* on all these defenses (61-77, 11880) and a *general verdict* was returned for the defendant upon which a judgment was entered on May 18, 1933 (61, 11880). A motion for new trial was filed and overruled and *no appeal taken.*

On May 16, 1935, the petitioner as plaintiff filed directly in the District Court a complaint in equity to set aside that judgment on the ground of supposed fraud (78-82, 11880); that complaint alleged (omitting much verbiage): that plaintiff told the agent or agents who solicited the policy that an army surgeon in 1918 had erroneously diagnosed him as being afflicted with *dementia praecox* (a form of insanity), that he denied to the agent that he was insane, that the agent then had him examined by a physician, who was also told of the action of the army surgeon, that the agent assured plaintiff *"that no question of sanity would or could be raised by defendant"* (80, 11880), that he was led to believe by *defendant* and its agents that no such defense would be made; *that defendant issued the policy with full knowledge and waived all such defenses* (80, 11880) but thereafter fraudulently concealed and hid its records, the whereabouts of the agent (Denison), and the fact of a medical examination, and that plaintiff was thereby fraudulently deprived of the necessary testimony to combat the "defense"; this complaint contained various loose allegations of diligence, the discovery of *"positive evidence"* (82, 11880) *of such fraud,* etc., and prayed that the original judgment be set aside, and for general relief. Motion to dismiss was filed (83, 11880) and sustained (86, 11880). That case was appealed, the decree dismissing the bill was affirmed (See *Kithcart* v. *Metropolitan,*

88 F. 2d 407), and the matter supposedly disposed of. The court there noted the various steps which plaintiff might and should have taken in the trial of the law action to protect himself against an adverse judgment or a submission of the case if the facts then (and now) claimed were true.

In 1938 two additional suits were filed in rapid succession in the State Court by this plaintiff against defendant and three individuals named as its agents. These petitions appear at pages 88-97, 11880. These cases were each removed to the United States District Court (71, 72, of present record, also 92, 97, 11880). In each of those suits plaintiff alleged fraud on the part of defendant and its agents (alleged to have been acting within the scope of their authority) arising generally out of the same matters previously referred to, with some slight changes in detail; he claimed damages in the sum of $77,500. Each such suit was voluntarily dismissed after removal (92, 97-98, 103, 11880). It is perhaps worthy of note that in a motion to remand in the second of those cases, the plaintiff stated (100, 11880) that the suit was a tort action and not a continuation of any suit on the contract, that *"The judgment on the contract should not be set aside, that a new trial should not be granted on the policy"* and that the judgment in the prior equity suit was *"final and conclusive"* so far as any suit on the contract was concerned (This, it is noted, is precisely the contrary of his present contentions).

The next suit in equity was filed on April 18, 1940, again seeking to set aside the original law judgment of May 18, 1933 (1-34, 11880), and praying for an award of $77,700 and for general equitable relief. It is difficult to digest that lengthy complaint intelligently. The District Court also found that difficulty (44-45, 11880). It is necessary to attempt this, however, for the purpose of

comparing it with the present complaint on the question of *res adjudicata*. It is alleged: That one Denison solicited and negotiated with plaintiff for the policy in question, saying he was not employed by defendant but nevertheless conducting all the negotiations; that plaintiff told him about his diagnosis of dementia praecox in the army in 1918, and showed his army discharge bearing such an endorsement, telling him this was merely a "mistake"; that Denison said that he and Magoon (District Manager) and Marshall (allegedly Assistant General Manager) had investigated his army record, and that the company was satisfied; then followed a narrative concerning certain alleged "*preliminary instruments*" (*for the first time referred to in 1940*, although four previous suits had been filed and disposed of) as follows: That Denison drew up (a) a medical report stating that plaintiff had no bodily or mental disease, which report was allegedly signed by *plaintiff;* (b) an affidavit of the army physician stating that the insanity diagnosis was a *mistake;* (c) a letter reciting *Denison's* investigation and findings, but *signed by plaintiff;* (d) a *contract* (6-7, 11880) agreeing that plaintiff was of sound mind, body, health and earning power and that both parties were "*estopped*" to use any prior evidence to the contrary in any legal proceedings and that the company was *estopped from all objection that any prior mental or bodily diseases or infirmity contributed to any future disability;* that plaintiff signed this contract and Denison told him that the Manager and Assistant Manager had signed it, and that all the "*instruments*" had been sent to the company and were a part of the policy; that plaintiff also signed an application for the policy as directed by Denison who later delivered the policy, collected the premium and gave him a receipt, and said that the company had approved the "preliminary instruments"; that thereafter plaintiff was disabled solely

by accidental means (an alleged fall down the steps at his home less than seven months after the date of the policy), gave notice, and sued defendant on the policy; that defendant and its agents *conspired* together, and *cheated and defrauded him* of his rights to indemnity by concealing the "preliminary instruments" and their supposed approval, and by denying the employment of Denison; that he was thereby rendered unprepared to meet the defense (in the suit on the policy) that his supposed disability was caused wholly or partly by insanity; then followed various allegations regarding the previous equity suit in 1935, the other two suits in 1938, his supposed "diligence", and that "all (prior) allegations of fraud * * * were mere conclusions" (18, 11880); that he did not discover the facts alleged until Februray of 1939 including the allegations (and supposed facts) that defendant was actually a party to the "preliminary instruments," had "approved" them, and that the named agents were duly authorized, but that he did make such discoveries in February, 1939. Plaintiff prayed that the court take general equitable jurisdiction of the case, make "*right* the wrongs herein complained of" (21, 11880), that the judgment of May 18, 1933, be set aside, that he be awarded a judgment, "in keeping with the facts and the law," of $77,700 and for such "*other and further equitable relief*" as might be "just and proper." The previous petitions were all made part of this petition or complaint by reference and various exhibits were attached (21-34, 11880). A motion to dismiss (34, 11880) was filed, based upon the grounds (a) that the complaint failed to state any claim upon which relief could be granted, and also (b) that the alleged issues raised had been adjudicated both by the District Court and by the Circuit Court of Appeals. This motion was sustained

(35, 11880), and no request was made for leave to amend; on appeal the Circuit Court of Appeals affirmed, as shown at 119 F. 2d 497.

The present suit was filed on April 24, 1944, in the state court (1); it was duly removed (1, 39-45). The petition for removal alleged not only diversity of citizenship, but that the suit constituted an attack upon the prior judgments of the United States Courts, as referred to in the amended petition, and that the United States District Court had the rightful jurisdiction of the cause for the purpose of protecting its jurisdiction and former judgments. The amended complaint (or petition) appears at pages 3-37; that amendment was filed before the cause could even be removed. A digest of that complaint is difficult, if not impossible; the District Court attempted it (49-50). He sustained the motion to dismiss on the ground that the "amended petition" showed on its face (taking judicial notice of the prior proceedings, as the Circuit Court of Appeals had held he should—88 F. 2d 407) that "the controversy presented is *res adjudicata*." The present amended complaint refers to all the prior suits; in fact much of its content is devoted to discussions of those suits and conclusions concerning their supposed effect. Therein plaintiff again alleges all the same matters, with some changes and additions in wording, and some elaboration, but with no real change in substance. Since the amended complaint is set out in the record (3-26) and the court will undoubtedly read it we shall not digest it here in detail. We note, however, that this complaint (amended petition) shows affirmatively: plaintiff's knowledge of all the substantive facts alleged and of the claimed "frauds," at least as early as May, 1933, when the original law action was tried: and his full knowledge that *then* the defendant fully repudiated the supposed agreements, and that the court ruled out all

evidence thereof. Plaintiff now alleges no substantial or material facts (as distinguished from pure conclusions) which he did not know (or of which he was not charged with knowledge) in May, 1933. There is nothing new in the present amended petition except a change in the *title* and a slight change in the *prayer* (which we shall discuss briefly in the argument). Plaintiff again claims that all prior actions were "misconceived," claims that he is entitled to $50 per week as disability benefits *from January 11, 1930,* to the date of judgment, plus penalties, attorneys' fees and interest, and that the contract of insurance should be reformed by attaching the "documents" (or some of them) to the application, for the reason that as shown by the prior decisions plaintiff cannot recover on the policy as issued. It is further alleged that defendant should be required to pay the costs and attorneys' fees in *all the previous "misconceived" suits.* In other words, in Count 1 of this amended petition plaintiff seeks reformation, general relief and a decree for the payment of all the amounts so mentioned. In Count 2 he "adopts" the policy as so reformed, and prays judgment for all these sums of money, alleging again the issuance of the policy, the supposed accidental injury, the existence of supposed disability and the prayer for a money judgment.

After the case was lodged in the District Court upon removal, petitioner's counsel filed a "Plea to the Jurisdiction" (46-47) alleging that Sections 71 and 72, Title 28, U. S. C. A., providing for the removal of causes by reason of diversity of citizenship, were and are *unconstitutional.* This plea was overruled (48). Most of petitioner's argument (Petition for Certiorari, 44-66) is directed to this point. We shall answer it very briefly in the argument.

Neither the trial court nor the Circuit Court of Appeals has held that petitioner's present "amended petition" stated a claim upon which relief could be granted. The trial court rested its order and judgment upon the doctrine of *res adjudicata*, while the Circuit Court of Appeals, *without passing upon that question*, based its opinion upon the *Missouri Statutes of Limitation* and the established constructions thereof. Petitioner is asking this court to review anew the Missouri law on that question. However, both the question of limitations and the application of the doctrine of *res adjudicata* are still in the case, for if the motion to dismiss should have been sustained on either ground, the judgment is right, and certiorari should not be granted.

The present petition is novel, to say the least, for two reasons: (1) It seeks to retry substantially identical litigation which has been continuing for fourteen years and which has been disposed of by *four* District Court judgments and *three* affirmances by the Circuit Court of Appeals and (2) counsel, in the present petition, strenuously allege and insist that the *removal statutes* are unconstitutional and void, in the face of the uniform course of decisions of this court.

SUMMARY OF THE ARGUMENT.

I.

The motion of Respondent to dismiss the amended complaint (petition) was properly sustained because of the Statutes of Limitation of the State of Missouri (as determined by the Circuit Court of Appeals), and also because all matters alleged are *res adjudicata* (as determined by the District Court); for

A. The action, being one for relief on the ground of fraud, is barred by Sec. 1014, R. S. Mo., 1939, wherein the limitation period provided is five years after the discovery of the fraud, and no improper act *preventing* the commencement of an action within the meaning of Sec. 1031, R. S. Mo., 1939, has been shown; and even if the present action were one on a written contract, the limitation of ten years provided by Sec. 1013, R. S. Mo., 1939, had expired prior to the institution of the present suit.

B. All issues alleged in the present suit have been adjudicated in the prior litigation; the judgment in the original law action foreclosed all claims upon any contract which petitioner had with the respondent; the present suit is one upon a cause of action identical with prior equity suits between the parties, and the final judgments therein are a bar to this action; and even if the present suit were one upon a different cause of action, nevertheless, the precise contentions now made have been finally adjudicated adversely to the petitioner in those prior actions. The doctrine of *res adjudicata* (which petitioner seeks to ignore) must here be considered, for if the judgment below is correct for any reason raised, it will not be disturbed.

II.

The contention that the removal statutes (Secs. 71 and 72, Title 28, U. S. C. A.) are unconstitutional as in violation of the "Privileges and Immunities" clause of the Fourteenth Amendment, is without merit, and is made in the very teeth of the uniform decisions of this court; these statutes were enacted pursuant to the authority of Article III, Sections 1 and 2, of the Constitution, and also pursuant to Article I, Section 8; the Fourteenth Amendment is not in any wise a limitation upon the power of Congress to provide for the removal of causes by reason of diversity of citizenship, or otherwise, as provided in Article III; we are not here discussing the wisdom of those enactments (for that is a legislative matter), but, beyond all question, they are constitutional.

ARGUMENT.

I.

A. The Question of Limitations.

After three law actions and two prior equity suits, this present suit was instituted on March 10, 1944 (26). The law action on the policy was tried in May, 1933 61, 11880). The history of the subsequent suits is well related at 88 F. 2d 407, and 119 F. 2d 497. All subsequent actions have been based upon the *supposed* fraud of defendant and its agents in denying the supposed waiver-agreements, concealing records and witnesses and conspiring to defeat plaintiff of his rightful claims. Since the case is here on motion to dismiss, we must, for the sake of the argument, consider all of plaintiff's allegations, though the very statement of some of his claims raises a doubt of their merit.

As the Court of Appeals well pointed out, plaintiff's own allegations show that in May, 1933, defendant denied (both in testimony in the law action and by objections) the making of any such agreements and their effect if made, that it then and there *repudiated* any and all claims of plaintiff upon his present theory of *extending* the policy coverage, and offered evidence of prior insanity, along with sundry other defenses on the merits. As pointed out by the Court of Appeals in 88 F. 2d l. c. 410, plaintiff and his counsel then took *none* of the various steps which they might have adopted to protect against a final submission but elected to submit the case on the *other issues* besides "waiver." Plaintiff, himself, was a party to whatever had transpired and certainly these proceedings and *this repudiation* in May, 1933, put plain-

tiff on full and adequate notice that then and henceforth defendant denied for all purposes the making and creation of any waivers or estoppels, and that it stood firmly on the terms of the policy as issued and delivered. The defendant was there represented not only by witnesses, but by its counsel of record. And the District Court, by its very rulings, notified plaintiff that the present theory of collateral agreements was not available in a suit on the policy, as written. Plaintiff has now alleged *nothing* which can legally detract from the effect of the notice thus given. He has alleged nothing which would *legally* excuse him from attempting promptly to *reform* the policy, if he wished it reformed. What he now complains of is—not that he did not know the facts, for he asserts that he did all the time—but that the defendant did not furnish him all the evidence he desired and help him, then or thereafter, to make his case. This the defendant is not required to do (88 F. 2d l. c. 410). If there ever was any *fraud*, plaintiff discovered it fully in May, 1933, if not previously. The so-called later "discoveries" are purely statements of conclusions and of immaterial matters (as for instance whether the application was *witnessed* by Denison or Marquis—13). We repeat—there is *nothing* alleged which plaintiff did not know—or with which he was not legally charged with knowledge—at least as early as May, 1933. The Court of Appeals has not "ignored" any of his allegations.

We next consider Sec. 1014, R. S. Mo., 1939, providing that "*an action for relief on the ground of fraud*" shall be brought within five years of the discovery of the fraud. Note the wording: "An *action* (meaning *any* action) for *relief* (*i. e., any* kind of relief) *on the ground of* fraud!" That is to say, any action, for any form of relief, in which the plaintiff *bases* his right upon any

fraud of the defendant, is so limited. It should require no further argument, we think, to show that this section of the Statutes is applicable here. Every suit the plaintiff has filed since 1933 is based *solely* on allegations of fraud. It was held in *Ludwig* v. *Scott*, (Mo. Sup., 1933) 65 S. W. 2d 1034, that actions to cancel or reform instruments or contracts on the ground of fraud, except where the object of the suit is to recover real estate, are governed by this section. That case is one of these cited by the Circuit Court of Appeals (150 F. 2d 997, 999); and see also *Coleman* v. *Crescent Co.*, (Mo. Sup., 1943) 168 S. W. 2d 1060, 1065, which re-iterates the doctrine. The Circuit Court of Appeals, sitting in Missouri, has considered this suit as one seeking relief "*on the ground of fraud.*" Even plaintiff's so-called "discovery" of February, 1939 (13), which is really alleged to be nothing but a discovery as to what agent *witnessed* the application, occurred more than five years prior to the institution of the present suit (Record 26—March 10, 1944).

So far as concerns the contention that the running of this Statute (or any other Statute) was tolled by any "improper act" under Sec. 1031, R. S. Mo., 1939, we first call attention to the language of the Court of Appeals (150 F. 2d l. c. 1000):

> "But, while the 23-printed page petition abundantly uses the word fraud, it does not set out any facts which legally can be accepted as having prevented the general statute of limitations from commencing to run in 1933 against the insured's right to have the asserted provision incorporated in the policy."

And, also, as the court pointed out, the effect of any "*lulling*" statements previously made to plaintiff by defendant's agents would "*legally have ceased to exist*"

upon the trial of the law action, in view of the disclosures, repudiations and rulings then made. The allegations of supposed continuations of the fraud since 1933, of concealments, of "discoveries," etc., do not change the picture in any way; at most they relate to matters of *evidence,* not of *knowledge,* for plaintiff's knowledge was complete in 1933, including knowledge of the *claimed* intention of defendant to defraud him. And fraud, to be actionable for any purpose must be *secret and concealed,* not *patent or known* (*Wood* v. *Carpenter,* 101 U. S. 135, 140-141; *Pickford* v. *Talbott,* 225 U. S. 651), for any other rule would permit interminable litigation, upon the mere discovery of additional cumulative evidence. And an "*improper act*" under this section must be one in the nature of a legal fraud, which *prevents* the commencement of an action, *Davis* v. *Carp,* 258 Mo. 686, 698, 167 S. W. 1042; *Ball* v. *Gibbs,* (C. C. A. 8) 118 F. 2d 958. The very gist of Section 1031, *supra,* is that by an improper act (fraud, so construed) the commencement of an action *is prevented.* There has been no *prevention* here; plaintiff has in the interim instituted *four* other actions prior to this one all based on supposed fraud. His complaint is that he and his counsel *guessed* wrong on the remedy or remedies prayed for, until they were finally *convinced* upon the denial of certiorari by this court (after 12 years of prior litigation). The defendant is not responsible for their choice of remedies, nor for their obstinacy before being "*convinced*"; nor does all this detract from the fact that in each and all of such prior suits they *did* allege the substance of all the same matters as are here alleged, and that the prior pleadings specifically showed actual knowledge on the part of the plaintiff ever since 1933 of the very things he is now complaining of.

Petitioner contends that this is a suit on a written contract, and that the 10 year Statute of Limitations is applicable (Sec. 1013, R. S. Mo., 1939). We have already seen that this is, in reality, an action for relief *on the ground of fraud,* and therefore limited by Section 1014. It could be nothing else; the written contract has been adjudged not to include or permit any such provisions as plaintiff claims and it has been dissolved or merged into a general verdict and judgment for the defendant rendered in 1933. It is *gone.* The things plaintiff has since alleged so strenuously are the very antithesis of that policy-contract. However, if this could possibly be considered as a suit upon a written contract, the result is the same. A period of *eleven* years had intervened between the trial of the law action and the filing of the present suit. We have seen that there were no "improper acts" within the meaning of the law, which would toll the running of any Statute after the knowledge acquired by plaintiff in May, 1933. So it really makes little difference which Statute is applicable, though we are firmly convinced that it properly is Section 1014. Sec. 5844, R. S. Mo., 1939, cited by plaintiff, provides among certain other things that a soliciting agent shall be deemed to be the agent of the company and not of the insured (*Bennett* v. *Royal Union,* (Mo. App.) 112 S. W. 2d 134, 146-147). It is wholly inapplicable here; in fact it, and the following section, are penal statutes. Sections 1013, 1014 and 1031 discussed above are set out in the appendix to this brief.

It is entirely probable that the period of limitations began to run (so far as any reformation is concerned) from the receipt of the policy by plaintiff in 1929, for he was advised by its very terms that *no agent* had authority to change it or waive any of its provisions. And he was legally charged with knowledge that such provision

was valid and effective (88 F. 2d 407). The application itself contained a like notice and an *agreement* that no information had been furnished to any agent except as written therein, and that no information or statements not included therein should be binding on defendant. Under these circumstances the Missouri authorities hold that a person accepting and retaining such a policy without promptly seeking relief, is bound by its provisions. See: *Steward* v. *Mutual Life Ins. Co.*, (Mo. App.) 127 S. W. 2d 22; *McHoney* v. *German Ins. Co.*, 52 Mo. App. 94, 99; *American Ins. Co.* v. *Neiberger*, (Mo. Sup.) 74 Mo. 167; *Winegardner* v. *Service Life*, (Mo. App.) 59 S. W. 2d 712; *Raker* v. *Service Life*, 226 Mo. App. 1233, 49 S. W. 2d 285; *Christensen* v. *New York Life*, 160 Mo. App. 486, 141 S. W. 6. In some of these cases the insured had retained the policy only a few months, but was barred of relief. When we consider also the fact that plaintiff retained the policy here until after the alleged accident, elected to sue on the *policy alone*, and elected to submit the law action to the jury on *all* the issues raised therein, his lack of diligence becomes a certainty.

The motion to dismiss might properly have been sustained on the ground that the complaint affirmatively showed *laches*. Every allegation of this complaint shows that plaintiff is raising matters of which he has had both legal and actual knowledge for at least eleven years (and probably longer), and that during all this interim he has burdened the defendant enormously with the expense and inconveniences of sundry suits. Equity should certainly not extend its doctrines to accommodate a suit of this kind. Plaintiff has affirmatively shown a lack of diligence (88 F. 2d 407). Laches, of course, refers to the party's lack of diligence under all the circumstances and

to the *inequity* of his present claims. The lapse of time is an important element, though not the only element. Here we think the lapse of time alone would be sufficient to establish the bar—certainly the lapse of time, combined with the *actual* lack of diligence, the inequities of plaintiff's position and his continued harassment of defendant, would suffice. And the question of laches may be raised by motion to dismiss. *McMullen* v. *Lewis,* 32 F. 2d 481 (C. C. A. 4); *Young* v. *Southern Pacific,* 34 F. 2d 135 (C. C. A. 2); *Reed* v. *Fairmont Creamery,* 37 F. 2d 332 (C. C. A. 8); *Baker* v. *Spokane Savings Bank,* (D. C. Wash.) 5 F. Supp. 538, affirmed 71 F. 2d 487 (C. C. A. 9); *Nitkey* v. *S. T. McKnight Co.,* (C. C. A. 8) 87 F. 2d 916, It makes no difference that the present complaint is called one for "reformation," for its allegations and its objects are substantially identical with the previous suits in equity; and, after all, it seeks to *set aside* the prior law judgment (as did the prior equity suits), without which action no effective relief could possibly be granted.

Plaintiff complains of the manner in which the question of limitations was here raised; and in so doing relies on what his counsel assert to be the Missouri law. The motion (45-46) stated expressly that the claim was "barred by laches and by the Statutes of Limitation of the State of Missouri." An examination of petitioner's cited cases will disclose varying situations: in one (*Gibson* v. *Ransdell,* 188 S. W. 2d 35) a defendant filed a demurrer relying *specifically* upon a certain section of the statutes and *later* attempted to broaden his objections upon appeal. It was held that he would be confined to his theory below. Another case (*Murphy* v. *DeFrance,* 105 Mo. l. c. 62) refers solely to the question of pleading in an *answer.* In another (*Knisely* v. *Leathe,* 256 Mo. 341) a very specific demurrer was filed pleading

the wrong statute. In Missouri demurrers (now designated as motions to dismiss) are *statutory* and the grounds (as of the time of the present pleadings) therefor were specifically defined in Sec. 922, R. S. Mo., 1939; one such ground is that the petition does not state facts sufficient to constitute a cause of action, but no ground based on limitations is specified. The rule would seem to be, therefore, that the point may be raised by a general demurrer if the defect appears on the face of the petition, but must be specially pleaded if raised in an answer. Thus, in *State ex rel. Jones* v. *Nolte,* (S. Ct. Mo. *in Banc*) 165 S. W. 2d 632, 638, the court said:

> "Advantage of it must be taken by a demurrer if the running of the Statute appears on the face of the petition, or by a special plea if it does not."

And see *Ludwig* v. *Scott,* (Mo. Sup.) 65 S. W. 2d 1034, cited by the Circuit Court of Appeals. There is really no provision in the Missouri Statutes for a "speaking" demurrer.

But the Missouri rules of pleading did not control this case at the time of the filing of the Motion to Dismiss. It had been lodged in the United States District Court on removal and Rule 81 (c) of the Federal Rules required all pleadings and procedure thereafter to be governed by those rules. The motion to dismiss is sufficiently specific and the question of limitations may properly be raised upon a motion to dismiss. See: *Berry* v. *Chrysler Corporation,* (C. C. A. 6) 150 F. 2d 1002, 1003; *A. G. Reeves Steel Construction Co.* v. *Weiss,* (C. C. A. 6) 119 F. 2d 472, certiorari denied 314 U. S. 677; *Gossard* v. *Gossard,* (C. C. A. 10) 149 F. 2d 111, 113; *Hartford-Empire Co.* v. *Glass Co.,* (D. C. Pa.) 47 F. Supp. 711, 714; *Abram* v. *San Joaquin Cotton Oil Co.,* (D. C. Calif.) 46 F. Supp. 969, containing a full discussion of the question

with citations: *Wilson* v. *Shores-Mueller Co.*, (D. C. Ia.) 40 F. Supp. 729; *Wright* v. *Bankers Service Corp.*, (D. C. Calif.) 39 F. Supp. 980. And it seems, from the above cases, that beyond question the defendant might raise the question of limitations simply by an objection that the complaint fails to state a claim upon which relief can be granted; it pleaded considerably more here.

And, of course, the United States courts take judicial notice of the Missouri Statutes of Limitation, even where not specially pleaded. *Lamar* v. *Micou*, 114 U. S. 218, 223; *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Prudential Insurance Co.* v. *Carlson*, (C. C. A. 10) 126 F. 2d 607, 611; *Richter* v. *Empire Trust Co.*, (D. C. N. Y.) 20 F. Supp. 289.

The case was correctly ruled by the Circuit Court of Appeals on the question of limitations and its decision should not be disturbed.

B. The Question of Res Adjudicata.

The statement in this brief was made partly for the purpose of demonstrating to the court that the present suit is one upon a cause of action *substantially identical* with some of the previous suits, and that relief here is foreclosed also by the judgment in the original law action. The District Court based its ruling on the doctrine of *Res Adjudicata, not actually passing* upon the other grounds assigned; the Circuit Court of Appeals has seen fit to base its affirmance upon the ground of limitations. If the sustaining of the motion was proper upon either (or any) ground alleged, the writ of certiorari should not be issued or the judgment disturbed. *Helvering* v. *Gowran*, 302 U. S. 238, 245; *Securities and Exchange Com.* v. *Chenery Corp.*, 318 U. S. 80, 88; *Riley Inv. Co.* v. *Commissioner*, 311 U. S. 55, 59; *Farmers Guide Co.* v. *Prairie Farmer*, 293 U. S. 268.

This petitioner has, in reality, been alleging at least since 1935 the same substantive facts which he now

alleges. In each new suit a little cumulative material has been added, but nothing more. First, let us examine the issues, verdict and judgment in the original law action on the policy, determined in 1933 with no appeal, for this bears directly on petitioner's present contentions. The answer (55-59, 11880), the requests for a directed verdict (59-60, 11880), and the District Court's charge to the jury (61-77, 11880) all show conclusively that the following matters were directly in issue there and were submitted: (1) Whether plaintiff was *totally and continuously disabled* within the meaning of the policy; (2) If he was ever so disabled, whether disability began within the term of the policy; (3) If so, did disability result from bodily injuries caused directly and independently of all other causes by violent and accidental means? (*including the question as to whether any accident ever occurred at all* as plaintiff testified; (4) Was disability (if any) caused wholly or partly by disease or bodily or mental infirmity (and this would apply to any disease or infirmity occurring after the issuance of the policy as well as before, and to any physical disease as well as mental infirmity); (5) Whether defendant received *notice* of accident as required by the policy (the lack of which was specifically pleaded (57, 11880). (Note: the answer contained a general denial which, of course, required plaintiff to prove all his allegations.) All these issues were fully and painstakingly covered and submitted in the charge to the jury (61-77, 11880). The verdict was a *general verdict* (61, 11880). The suit was one upon this same policy for indemnity for the same alleged accident. A determination against plaintiff on *any one* of the above issues would have been (and is) conclusive against him as to *any* and all right of recovery. A *general verdict*, such as was rendered there, concludes *all issues* against the plaintiff. *Erie R. R.* v. *Schleenbaker*, (C. C. A. 6)

257 Fed. 667, certiorari denied 250 U. S. 666; *Lynch* v. *Darnell*, (C. C. A. 8) 265 Fed. 913, certiorari denied 254 U. S. 638; *Grand Trunk Western R. Co.* v. *Collins*, (C. C. A. 6) 65 F. 2d 875; *West Penn. Chem., etc., Co.* v. *Prentice*, (C. C. A. 3) 236 Fed. 891; *Kithcart* v. *Metropolitan Life Ins. Co.*, 119 F. 2d 497, 499. The jury may have disbelieved the plaintiff entirely, finding that there was *no accident*; it may have found that he was *never disabled* within the meaning of the policy from any cause; it may have found that he had given defendant *no sufficient notice* of accidental injury, which question was one of the contested issues in the case. An adverse finding on any of these issues (or certain others) would have forever foreclosed a recovery, and would render a "reformation" wholly immaterial. As said in 119 F. 2d l. c. 499, it has never been shown that the result of the law action would be different if it were tried again (and we may now say, parenthetically, that it has not been shown that the result would be different if the policy were *reformed* and the case retried). All causes of action upon that policy and all rights or supposed rights arising out of the policy have been merged into that judgment. As the court said in 88 F. 2d l. c. 410, plaintiff "*submitted his case to the court and jury, apparently taking chances on a successful outcome of the litigation.*" It is thus clear that he was precluded from a recovery *by an adverse determination of various issues other than the one he has now been seeking for 12 years to re-litigate;* in this situation the matter may certainly not be re-opened. The judgment in the law action was fully *res adjudicata* of his right to recover on that policy (in any form) for his alleged disability. And it certainly has not been shown, and cannot be shown, that on any other trial the result would be different, especially in view of the *various issues submitted and decided.* Such,

in any event, is a requirement (*Kithcart* v. *Metropolitan*, 119 F. 2d 497, 500).

In the prior equity suits (78-82, 11880, and 1-34, 11880) the plaintiff alleged in *much* detail: that he had told defendant's agents of his prior supposed insanity, that defendant had had him examined by a physician, and that thereupon the defendant (and not merely its agents—14, 15; and 80, 11880) *waived all prior defects*, assured him that no question of insanity could or would be raised in the future, waived all defenses based thereon, and *estopped* itself to defend against any future claim on the ground that prior conditions (mental or physical; had contributed to any claimed disability. In the first equity suit it was alleged that such agreements were *oral;* in the second, it was claimed for the first time (in 1940) that they were contained in *written documents*, elaborately described. But, aside from this contradiction, the net result in each such case was that the plaintiff claimed and alleged a waiver (for all purposes) of all prior defects, and an agreement of the defendant that it should and would forever be estopped to use any evidence thereof for any purpose in any future litigation. (Thus the only real difference between the first two equity suits was in the *form* of the supposed agreements, which is wholly immaterial). Plaintiff then, in each such case went on to allege that defendant failed to keep its agreement, that it produced evidence of his prior insanity, concealed the whereabouts of witnesses and the alleged records, and defeated him in the law action, *because he could not prove the agreements which he had made*. The Circuit Court of Appeals in 88 F. 2d l. c. 410 pointed out very clearly the sundry things which plaintiff and his counsel might then have done to protect himself, if his allegations were and are true. The court there said:

> "* * * If, as alleged, the defendant had records, plaintiff should have demanded their production, or have issued a *subpoena duces tecum* for the purpose of making them available. Plaintiff himself knew, according to the averments of the bill, of his alleged conversation with the soliciting agent. He also knew that he had been given a medical examination and that he told the physician 'of the action of the army surgeon,' so that apparently he was in position to testify to all the matters which he now says were suppressed by defendant. It was, of course, not the duty of defendant to prepare plaintiff's case for trial, nor to furnish him with evidence, at least without some request or demand so to do. He might even have dismissed his action without prejudice, if, as he now says, he was taken wholly unawares by the course of the trial; but this he did not do, but submitted his case to the court and jury, apparently taking chances on a successful outcome of the litigation."

In both of those equity suits, with multitudinous allegations of agreements of waiver and estoppel (oral and written) and of fraud on defendant's part in preventing plaintiff's use of such "agreements," final adverse decrees have been rendered against the petitioner and each of these decrees has been *affirmed*.

The prayer of plaintiff in case 11880 (the second equity suit) was very broad—for the taking of general equity jurisdiction, a decree for all the disability-indemnity benefits, a decree setting aside the law judgment and for such other equitable relief as seemed proper (21, 11880). That prayer is of the same effect, in substance, as the present prayer; but it should be noted further that the complaint in that last prior suit was filed on *April 18, 1940*, long after the present Rules of Civil Procedure for the District Courts took effect. Under these rules the court not only may, but "*shall*" grant all relief to

which a party is entitled on the facts alleged, whether prayed for or not. Rule 54 (c). See also: *K. C., St. L. & C. R. R.* v. *Alton R. R.*, (C. C. A. 7) 124 F. 2d 780; *Keiser* v. *Walsh*, (D. C. App.) 118 F. 2d 13; *Bastian* v. *U. S.*, (C. C. A. 6) 118 F. 2d 777; *Cooper* v. *Goldsmith*, (D. C. App.) 135 F. 2d 949. It seems, therefore, conclusive that a final disposition of a prior equity suit stating the same facts is *res adjudicata* in a subsequent suit, irrespective of the particular *relief* demanded in either suit.

We omit here further reference to the two law actions for damages which were filed and dismissed, but they also contained the substance of all the same allegations. In the present case plaintiff really adds nothing to his previous claims and allegations. He still claims the preparation and execution of the same so-called "*preliminary documents*," that defendant thereby estopped itself from using any evidence of prior mental or bodily ills in legal proceedings thereafter, and that defendant and its agents by fraud concealed the evidence and prevented him from a successful defense of the law action (thus ignoring all the *other* issues and defenses involved and voluntarily submitted in the law action). This is just what he has been claiming ever since 1935. This present complaint is in no sense substantially different from the prior ones; there are changes in wording here and there, apparently made as new ideas have occurred to the plaintiff to fit the changing theories. But the whole theme is the same; that defendant made agreements of "estoppel," later denied them, prevented plaintiff from using such agreements by its fraud, and defeated him in the suit on the policy.

Plaintiff now says that he previously *misconceived* his remedies on these same alleged facts. He seems to say that he did not know until after the last decision

of the Circuit Court of Appeals (119 F. 2d 497, April 30, 1941), and indeed until he was *"finally appraised and convinced"* (present petition, p. 17) by this court's denial of certiorari on March 2, 1942 (315 U. S. 808), that he could not recover on the policy without reformation, or that extraneous evidence (such as he claims to have), was not admissible therein to prove an estoppel; that therefore, after 12 years, he should be granted a *reformation* of the policy, in order to make admissible the very matters which the Court of Appeals has *twice said* were wholly immaterial and incompetent to vary the contract. He has indeed been hard to *"convince."* The District Court told him in May, 1933, *so he says* (13) that such evidence was not admissible; the Court of Appeals told him so in 88 F. 2d 407 (March 9, 1937). His allegations in the present petition are *directly contrary to the record facts*. The two decisions of the Court of Appeals established no *new law*. Plaintiff and his sundry counsel (at least 3) are subject to the doctrine that everyone is *presumed* to know the law, even without being told. Certainly defendant is not to be sued forever because plaintiff and his counsel may continue to think up some new wording of the old litigation—"documents" instead of oral conversations, a slightly different prayer, or a plea that their previous actions have been *"misconceived"* —even though they knew all the facts (if there ever have been any "facts"). *Every* supposedly factual allegation that plaintiff now makes has been directly answered by the Circuit Court of Appeals in the opinions cited.

If, as the District Court and the Circuit Court of Appeals held, there is no difference between the first and second equity suits, then certainly there is no difference between the second one and the present one. A slight

broadening of the *prayer* cannot change the cause of action. *Fagin* v. *Quinn*, (C. C. A. 5) 24 F. 2d 42. There is certainly no other difference. And, in reality, even the prayers are the same; both complaints expressly ask that the law judgment *be set aside* and that plaintiff *be awarded, by decree, indemnity* for the full period of alleged disability. In the last prior suit *reformation* would necessarily be a part of the "other relief" to be granted if any effective relief was granted at all on plaintiff's allegations, for there would be no point in setting aside a law judgment and leaving the case open for a retrial on all the same issues under the same policy provisions. In the present suit the prayer is identical except that it expressly mentions "reformation." But reformation could not be granted without first setting aside the law judgment. The supposed object of both suits was to set aside the law judgment and procure an equity decree *establishing* some sort of a contract between plaintiff and defendant which would embody all the contentions of plaintiff, and which would be competent and conclusive against the defendant (Indeed in the first equity suit plaintiff expressly asked (82, 11880) that he be permitted to "present such evidence," which in effect would amount to a prayer for a reformation). Any setting aside of the previous law judgment and any "reformation" of the contract are so *interwoven* that even the prayers of the suits are legally identical; and all the suits actually are on the *same cause of action.*

The previous decisions of the Court of Appeals went further than a mere determination of the right to relief on those particular prayers; they held that nothing was alleged which was legally *actionable* at all, for any purpose, under any prayer. And nothing has here been added. If there ever was an attempt to prosecute a purported cause of action by *piece-meal,* such as was ex-

pressly condemned in this litigation at 119 F. 2d l. c. 500, this is it; and the situation is more exaggerated now, of course, than it was then, with still another suit filed.

If there is anything in the present complaint which has not been specifically adjudicated (and there is *not*) then the holding of the Court of Appeals in 119 F. 2d 497, l. c. 500, is applicable, as follows:

> "(6, 7) All the issues sought to be raised have been judicially determined adversely to the plaintiff in *Kithcart* v. *Metropolitan Life Insurance Co., supra.* Plaintiff does not plead any new cause of action, but at most he seeks to base his action upon some additional grounds. But a plaintiff cannot be permitted to prosecute a cause of action by piecemeal. A judgment upon the merits in one suit is *res judicata* in another where the parties and the subject matter are the same, and the judgment is binding not only as to matters actually presented to sustain the plaintiff's cause of action, but also as to any other available matters which might have been presented. *Kithcart* v. *Metropolitan Life Ins. Co., supra*; *Edwards* v. *Terminal Shares*, 8 Cir., 109 F. 2d 974; *Engebretson* v. *West*, 8 Cir., 111 F. 2d 528; *Continental Natl. Bank* v. *Holland Banking Co., supra*; *Northern P. R. Co.* v. *Slaght, supra.* * * *"

In the last preceding equity suit an application for certiorari was denied (315 U. S. 808). We venture to assert that no court ever entertained a suit for reformation under circumstances similar to these. Any reformation of the policy at this stage would permit a relitigation of the same issues which have been concluded by the judgment rendered in 1933, as well as by each of the subsequent equity decrees.

The so-called "reformation" which plaintiff seeks would not be a reformation of the policy at all. It would,

in substance, change an accident policy (strictly limited to such) to a general *health* policy covering disability from practically *any* cause, and incorporate also a clause making it incontestable from its date of issue. Surely no such thing can be done, for the relief so sought is entirely inconsistent with the very theory and purpose of the policy as applied for and issued.

We refrain from any citation of authorities on the general doctrine of *res adjudicata* as applied in successive suits on the same cause of action. But even if this were to be considered a suit on a new or different cause of action (which it certainly is *not*) still every issue raised and litigated between the parties in the previous suits is *res adjudicata*. *Sou. Pac. R. R.* v. *U. S.*, 168 U. S. 1, 48; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *Geo. H. Lee Co.* v. *Federal Trade Com.*, (C. C. A. 8) 113 F. 2d 583, 586; *National Surety Corp.* v. *Ellison*, (C. C. A. 8) 88 F. 2d 399, 407; *Henderson* v. *U. S. Radiator Co.*, (C. C. A. 10) 78 F. 2d 674; *Cont. National Bank* v. *Holland Banking Co.*, (C. C. A. 8) 66 F. 2d 823.

The various equity suits here involved are so far identical that the previous decisions of the Court of Appeals are really the *law of the case*, and therefore unassailable under the well recognized doctrine regarding successive appeals. See *Finley* v. *United Mine Workers*, (C. C. A. 8) 300 Fed. 972, and cases there cited (Opinion modified on other grounds, 268 U. S. 295).

Plaintiff heretofore relied on the case of *Northern Assurance Co.* v. *Grandview Bldg. Co.*, 203 U. S. 106, as eliminating the defense of *res adjudicata*, and cites it here. The facts in that case must be considered. In a previous law action the *only question* involved had been the admissibility and effect of extraneous evidence to overcome a policy requirement that the existence of other

insurance (fire) must be endorsed on the policy, as stated in the second syllabus in the law action (183 U. S. 308)—"and hence the question in this case is reduced to one of waiver." In the law action the plaintiff *expressly pleaded* in detail (183 U. S. 310, 311) a waiver of the policy provisions by reason of notice to and knowledge of the defendant's agents. A special verdict was returned which found the giving of the oral notice to a "recording agent" and the essential facts upon which plaintiff relied to establish a waiver. The court held, however (in the law action), that the policy provisions were valid and binding, and that oral notice was insufficient to establish the claimed waiver. It further appears (203 U. S. 106, 108) that prior to the institution of the law action the Supreme Court of Nebraska and the Circuit Court of Appeals for the Circuit had held that *"the law was competent to give a remedy"*—in other words, that plaintiff might rely upon and establish a waiver in a law action upon the policy. It must be noted that the *plaintiff there, in the law action, pleaded and relied solely and expressly upon the theory of waiver and that there were no other substantial issues.* In the equity suit (decided in 1906) the court merely held that plaintiff was still pursuing his same theory of waiver, that in filing the law action he had followed the decisions as theretofore declared, and that in view of such decisions he probably had no *choice* of a remedy but was required to sue at law. The distinctions between that situation and the present one are readily apparent: (1) In the case cited the only question between the parties was, how could the waiver be proved; in our case (law) no waiver was *even pleaded,* and many other substantial and contested issues were involved and submitted. (2) In the case cited there had only been one previous judgment, namely, in the law ac-

tion on the policy; here there has not only been a law judgment on *sundry* contested issues, but two final equity decrees in cases *substantially identical with the present suit* which fact wholly distinguishes the present case from the one cited. (3) The law in this jurisdiction at the time of plaintiff's law action (1933) was clearly established that plaintiff *could not* vary the terms of the application and policy by oral evidence (See 88 F. 2d 407, and cases there cited). (4) In our case the plaintiff undoubtedly *did* make a binding election by proceeding to a submission on various issues other than that of waiver (the issue of waiver not even being properly raised or submitted in the law action). There was, and is, a direct inconsistency between the present plaintiff's submission of the law case on all the issues (especially when he had not even pleaded a waiver) and a subsequent plea to reform. It seems to us that a study of the cited case will indicate clearly that it is of no authority here.

The case of *Equitable Insurance Co.* v. *Hearne,* 20 Wall. 494, is also cited but it is clearly inapplicable on the present facts.

Plaintiff also cites *Baumhoff* v. *Railroad,* 205 Mo. 248; it is not in point. There the second suit, in reality, was merely an *equitable execution in aid of, and not in derogation of, the prior judgment;* the prior judgment established "plaintiff's right to the stock in kind" (l. c. 265); and to afford plaintiff the relief claimed in the second suit was merely to give full weight to all parts of the prior judgment and was in no sense inconsistent with it. The Missouri courts have long recognized the usual rules of *res adjudicata,* namely, that a judgment in a prior suit on the same cause of action is *res adjudicata* on all matters litigated and all matters which *might* have been litigated therein (See *State ex rel.* v. *Missouri Public*

Service Com., 351 Mo. 961, 174 S. W. 2d 871—*in banc; State ex rel.* v. *Hughes*, 347 Mo. 549, 148 S. W. 2d 576; *Cordia* v. *Matthes*, 344 Mo. 1059, 130 S. W. 2d 597; *In re Orth's Estate*, (Mo.) 169 S. W. 2d 401; *Kimpton* v. *Spellman*, 351 Mo. 674, 173 S. W. 2d 886; *Chance* v. *Franke*, 350 Mo. 162, 165 S. W. 2d 678), and also that a prior judgment is *res adjudicata* as to matters actually litigated therein, even in a subsequent suit on a different cause of action (See: *Gott* v. *Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83; *Missouri Dist. Telegraph Co.* v. *S. W. Bell Tel. Co.*, 336 Mo. 453, 79 S. W. 2d 257; *Hunter* v. *Delta Realty Co.*, 350 Mo. 1123, 169 S. W. 2d 936; *Kimpton* v. *Spellman*, 351 Mo. 674, 173 S. W. 2d 886; *Cooper* v. *Cook*, 347 Mo. 528, 148 S. W. 2d 512.

All of the last *four* suits filed by plaintiff have embraced the same issues, for only one substantive issue has ever been alleged. All these suits required the *same evidence* and all called for substantially the same result. The principle prohibiting the splitting of causes of action would, in itself, be a complete bar to the present suit.

In the case of *Fidel. & Guar. Fire Corp.* v. *Bilquist*, (C. C. A. 9) 108 F. 2d 713, it is clearly indicated that if a reformation is to be had, the original action on the policy must be kept open (by appeal or otherwise) and the pleadings amended to raise that issue before final judgment.

II.

The Constitutionality of the Removal Statutes.

We doubt that this point merits any serious or extended discussion. It is difficult for us to grasp the petitioner's theory. Apparently it is that the "Privileges and Immunities" clause of the Fourteenth Amendment *nullifies* Article III, Sections 1 and 2, and the legislation

enacted pursuant thereto, so far as any *removal of a cause* is concerned, at least on the ground of diversity of citizenship. In this contention counsel seems to ignore the fact that the Fourteenth Amendment is a restriction on the states—not upon the Federal power or jurisdiction; it was directed against the actions of state legislatures, and state officers (judicial or otherwise) in the making and enforcement of *state laws*. It has no relevancy to the validity of the removal statutes. It is the act of *denying* a removal (whether by judicial or legislative act) rather than the *granting* of one, which would deny the "Privileges and Immunities" of a citizen within the meaning of the Fourteenth Amendment (as so held in effect in the cases denying the validity of anti-removal statutes).

It is provided that the Judicial Power of the United States "*shall extend*" to all cases arising under the Constitution and laws of the United States, and to controversies between citizens of different States; and it "*shall be vested*" in such inferior courts as Congress may ordain (Article III, Sections 1, 2). The Constitution has given to Congress the *express power* (Article I, Section 8): "To constitute Tribunals inferior to the Supreme Court"; and the further *express power* to make all laws necessary and proper to carry into execution the Judicial Power so created. Under that express grant of power, Congress has acted (Judicial Code, Sections 28, 29; Secs. 71, 72, Title 28, U. S. C. A.).

The validity of these Statutes (as applied to diversity of citizenship cases) was expressly upheld in the early cases of: *Insurance Company* v. *Dunn*, 19 Wall. 214, 226 (86 U. S. 214), and *Railway Co.* v. *Whitton*, 13 Wall. 270, 287-288 (80 U. S. 270), it being further held that a corporation was a citizen, within the meaning of the acts. Even in those cases the constitutionality of the removal statutes was referred to as a matter of uniform recognition.

In *Gaines* v. *Fuentes et al.*, 92 U. S. 10, the court said, l. c. 17, 18:

"* * * The Constitution declares that the judicial power of the United States shall extend to 'controversies between citizens of different States,' as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all State authority. * * * But, in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests entirely with Congress to determine at what time the power may be invoked, and upon what conditions—whether originally in the Federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings—whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error. * * * The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the Federal and State courts since the establishment of the government. But the limitation of the original jurisdiction of the Federal court, and of the right of removal from a State court, to a class of cases between citizens of different States involving a designated amount, and brought by or against resident citizens of the State, was only a matter of legislative discretion. The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bring-

ing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary."

These cases have been followed in an unbroken line. See *Ellis* v. *Davis*, 109 U. S. 485, 498; *Hess* v. *Reynolds*, 113 U. S. 73, 77; *Whelan* v. *N. Y., etc., R. R.*, 35 Fed. 849, 858, 859; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 258 (dissenting opinion which was later adopted by the court at 257 U. S. 529); *Herndon* v. *Chicago, R. I. & Pac. Ry.*, 218 U. S. 135, 159; *Wisconsin* v. *Philadelphia & Reading Coal & Iron Co.*, 241 U. S. 329, 332, 333; *Terral* v. *Burke Const. Co.*, 257 U. S. 529; *Harrison* v. *St. L. & S. F. R. R.*, 232 U. S. 318; *Central Union Fire Ins. Co.*, v. *Kelly*, (C. C. A. 8.) 282 Fed. 772.

In *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, the opinion of Mr. Justice Day, later adopted as the law of this court (257 U. S. l. c. 533) was in part as follows, l. c. 258:

> "* * * The Constitution of the United States and the laws passed in pursuance thereof are the supreme law of the land, and of controlling authority over all the people, and in all the States of the Union. It is equally well settled that the privilege of resorting to the Federal courts for litigation of rights in controversies between citizens of different States is created by and exercised under authority of the Constitution of the United States, which secures to citizens of another State, when sued by a citizen of a State in which the suit is brought, the absolute right to remove their cases into the Federal court upon compliance with the terms of the act of Congress enacted to effect that purpose. This principle was announced in terms in *Insurance Company* v. *Morse*, 20 Wall. 445, has never been questioned, and is affirmed in frequent decisions of this court."

In *Terral* v. *Burke Construc. Co., supra,* and the various other cases holding *unconstitutional* state statutes forbidding (in various forms) the removal of causes by non-resident corporations licensed to do business in the state, this court has necessarily held (and *stated*) that such right of removal is a *constitutional* right; otherwise the statutes in question would not be *unconstitutional.* This rule has been consistently followed. See the cases heretofore cited, and also: *Illinois ex rel. Hakanson* v. *Palmer, Director of Insurance,* 367 Ill. 513, 11 N. E. 2d 931, certiorari denied 364 U. S. 561; *Mortensen, Commissioner,* v. *Security Ins. Co.,* 289 U. S. 702; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, 517. These authorities expressly affirm the unconstitutionality of *all* anti-removal statutes and the *constitutionality* of the statutory right of a non-resident to remove. The whole theory of these cases is that a state cannot be permitted to destroy or require the waiver of a right granted to citizens of other states *under the Federal Constitution,* and that the right to remove *is such a right.* And this does not depend upon the character or nature of the business transacted in the state. *Terral* v. *Burke Construction Co.,* 257 U. S. 529. There can be no serious question of the constitutionality of the Removal Statutes based on diversity of citizenship. In every case which has been tried in the Federal Courts on removal in approximately one hundred and fifty years, the constitutionality of the removal statutes has been directly or indirectly upheld.

Certainly the plaintiff has the right to institute a suit in the Missouri courts but he does so subject to the paramount conditions imposed by the Federal Constitution and the laws enacted by Congress thereunder. The citation of cases holding that states have no right to *exclude* citizens of other states (and of the United States)

from their courts are wholly inapplicable. Missouri has not excluded plaintiff from her courts; the defendant has merely exercised its Constitutional right of removal. And a Missouri court may certainly not be criticized for recognizing the provisions of the Federal Constitution.

Counsel's arguments regarding the "two legal capacities" and two citizenships have no practical application to this case. The Fourteenth Amendment was never intended as a limitation upon the Judicial Power of the United States. *Virginia* v. *Rives*, 100 U. S. 313; *Farrington* v. *Tokushige*, 273 U. S. 284, 299; *Hodges* v. *United States*, 203 U. S. 1, 14; *Board of Education* v. *Barnette*, 319 U. S. 624; *Swank* v. *Patterson*, (C. C. A. 9) 139 F. 2d 145, and cases there cited. Petitioner is a "citizen of the United States," only to the extent and purpose that a *State* (not the Acts of Congress) may not take away his "privileges and immunities" by the *passage and enforcement of any state law.*

Moreover, the "Privileges and Immunities" clause was only intended to protect a citizen in the enjoyment of such rights *as are derived from the Constitution and Laws of the United States* and not from other sources. *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Hamilton* v. *Regents of Univ. of Calif.*, 293 U. S. 245, 261; *The Slaughter House Cases*, 16 Wall. 36, 72-74; *McPherson* v. *Blaker*, 146 U. S. 1, 38; *Hensley* v. *Hensley*, 286 Ky. 378, 151 S. W. 2d 69; *Snowden* v. *Hughes*, 321 U. S. 1, 6-7; *Turning* v. *New Jersey*, 211 U. S. 78, 97; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 539; *State* v. *McCanse*, 21 Oh. St. 209. If the question here were one involving the right of a citizen of some other state to use the courts of Missouri, then a question under the Federal Constitution might arise. But when the question is solely one of the action of a Missouri court (pursuant to Act of Congress) in transferring the case of a *Missouri* citizen, no possible

constitutional question is present. The petitioner, in claiming to be a citizen of the United States, cannot *ignore* his Missouri citizenship. And the right of a citizen of Missouri to sue in the courts of his own state, is not a right springing from the Federal Constitution or laws. The contention here made by the petitioner is *not* within the meaning or intent of the Fourteenth Amendment or of the decisions last cited.

Many of the cases counsel cites—such as *The Slaughter-House Cases*, 16 Wall. 36, 77; *Corfield* v. *Coryell*, Fed. Cas. No. 3230; *Ward* v. *Maryland*, 12 Wall. 418, 430; *McKnett* v. *Railway*, 292 U. S. 230, and others, merely hold (so far as we are here concerned) that a state may not deny to a citizen of *another* state, privileges which it grants to its own citizens. It is in that regard that the so-called "Citizenship of the United States" becomes of importance and not where a state is dealing with its own citizens.

We respectfully suggest that this point needs no further consideration.

CONCLUSION.

The writ of certiorari is only to be granted under exceptional circumstances, and this is certainly not such a case as to invoke the court's discretionary power. It is not a case of general or public interest; it is not a case in which any novel principles of law have been declared; it is not a case involving conflicts between different circuits; and it is not a case in which state law has been mis-applied. This plaintiff has had, not a "day in court," but fourteen years, and his sundry suits have received painstaking consideration from all the courts concerned.

The insinuations of *prejudice* on the part of the District Judge (now deceased) are entirely without foun-

dation and apparently are made at this late hour because the petitioner dislikes the court's adverse opinion (49-50). The cases cited on the question of prejudice are wholly inapplicable. It would be exceedingly strange if it required all these years (1935-1945) for a plaintiff to find that the same trial judge was prejudiced. Even a casual examination of the record will forever foreclose petitioner's claim of a lack of due process. The lower courts are to be commended for the efforts they have made, and the patience they have employed in an attempt to unravel the confused and confusing claims of this petitioner over the period of years which has elapsed.

We respectfully submit that the petition for the writ of certiorari should be denied.

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APPENDIX.

Excerpts from Revised Statutes of Missouri 1939:

Sec. 1013. What actions shall be commenced within ten years.—Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for. (R. S. 1929, Sec. 861.)

Sec. 1014. What within five years. Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 1013, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. (R. S. 1929, Sec. 862.)

Sec. 1031. Limitation not to be extended by improper acts of defendant.—If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented. (R. S. 1929, Sec. 879.)

(3)

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 564.

BOYD L. KITHCART, PETITIONER,

VS.

METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PAUL E. BINDLEY,
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Attorneys for Petitioner.

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I.

Respondent's brief bases its claim that the reformation suit was barred by limitations on the following erroneous mis-statements:

Page 8. "The present suit was filed on April 24, 1944, in the state court."

Page 13. "* * * this present suit was instituted on March 10, 1944."

Page 15. "Even plaintiff's so-called 'discovery' of February, 1939, * * * occurred more than five years prior to the institution of the present suit (Record 26—March 10, 1944)."

Said claim of bar is refuted by recital of Transcript 1—13008:

"Original petition filed February 24, 1944."

Said filing of the petition was the commencement of the action as against the bar of limitations. *McGrath* v. *Railway*, 128 Mo. 1.

In *State ex rel. Bair* v. *Producers Gravel Co.*, 341 Mo. 1106, it is said:

> " 'it has been held that an action is begun in a court of record when the petition is filed. This, even though summons may not thereafter be issued until the action is barred.' "

II.

Respondent's present claim is that the action is barred by Sec. 1014, R. S. Mo., 1939. But it caused the Court of Appeals to hold directly to the contrary. The opinion of the Court of Appeals holds that the limitation for reformation is 10 years, as follows (77):

> "The general limitation on suits for reformation in Missouri is 10 years. Mo. R. S. A., Sec. 1013."

On page 48 of respondent's brief filed in the Circuit Court of Appeals is the following statement:

> "The period of limitations at law in Missouri for actions on written contracts is ten years (R. S. Mo., 1939, Sec. 1013)."

But on page 17 of its brief in this Court it says:

> "Petitioner contends that this is a suit on a written contract, and that the 10 year Statute of Limiations is applicable (Sec. 1013, R. S. Mo., 1939). We have already seen that this is, in reality, an action for relief on the ground of fraud, and therefore

limited by Section 1014. It could be nothing else; * * *"

Respondent, on pages 41 and 42 of its brief, under the heading Appendix, reprints three statutes of the State of Missouri, but omits the most important one, viz.: Section 1012, which is as follows:

> "Sec. 1012. Period of limitation prescribed. Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: *Provided,* that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

The language of said statute has been construed to mean what it says, and that it is immaterial whether the inability to sustain the action is caused by fraud, or any other cause. The reformation action could never accrue until the damage was capable of ascertainment, after February 25, 1939, as stated in *Propst* v. *Sheppard,* 174 S. W. 2d 359, l. c. 364:

> "* * * plaintiffs could not have sustained a suit because the damage they sustained was not 'capable of ascertainment' and their cause of action did not accrue until that time."

Section 1012 is applicable to and prevents the accrual of any cause of action, whether based on contract, fraud, or breach of duty, until the damage is sustained by the required breach of contract or breach of duty is capable of ascertainment.

It was impossible for the damage resulting to petitioner from respondent's misrepresentations at the trial in 1933, to the effect that Denison was never in respondent's employ and was not its agent and had no authority to make the contract, until petitioner discovered on Feburary 25, 1939, that all of said representations made to the court and to petitioner were untrue, and that in truth and in fact the papers shown by the amended petition to have been attached to the application were forwarded to the home office for approval, were approved, and were signed by respondent's authorized agents. The allegations of the petition disclose that respondent prevented the commencement of the suit for reformation until after February 25th, 1939 (10-13-14-15-16-17).

On page 16 of its brief respondent claims that the allegations of the amended petition

> "* * * at most relate to matters of evidence, not of knowledge, for plaintiff's knowledge was complete in 1933, including knowledge of the claimed intention of defendant to defraud him."

The petition, however, alleges, as shown at pages 14 and 15 of the petition for certiorari, that because of the acts of respondent it caused petitioner to believe that petitioner did not have a valid contract of insurance until February 25, 1939, on which date he went to the respondent's office and, because of facts he there described, made an investigation and then, for the first time, discovered that in truth and in fact the said agents had signed said document and said type-written part of said insurance contract and forwarded same to the home office of respondent for its approval (13).

Section 1014 is not a special statute of limitations but is included in Art. 9 of Ch. 6, R. S. Mo., 1939, as one of the general statutes of limitations, which

cannot become operative until the cause of action accrues under Section 1012 and under Section 1013. For, even where an action is grounded on fraud, both of said statutes may toll the five-year provision of Section 1014 with reference to fraud. *Parker* v. *McClain,* 229 Mo. 68.

The claim that the decision in *Ludwig* v. *Scott,* 65 S. W. 2d 1034, and another case, hold that the 5 year statute applies to the reformation suit herein is untenable, for the reason that the only questions involved in these cases were actions to *cancel deeds* on the ground of fraud. Hence said decisions could not be regarded as the law under the statement of the principle known as *stare decisis,* applied by Mr. Justice Curtis of this Court in a decision which we cannot find but which is quoted by the late Joseph H. Choate in the income tax cases, as reported at page 505 of his Arguments and Addresses (1926, West Publishing Co.), thus:

> "The question is, whether this exact question has been decided before—consciously, intentionally decided before; and nobody better than Mr. Justice Curtis has expressed that rule. His statement of it is cited and relied upon in your Honors' opinion, and so, I take it, it receives the approval of the Court down to this day. It is at page 44 of the printed opinion:
>
> > 'Mr. Justice Curtis said: "If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there *must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.*" '

To apply the maxim *stare decisis* to something the Court *did not decide,* nor *conceive to be involved* would be not merely wrong, but utterly unreasonable."

III.

Respondent's claim, with reference to *res judicata,* is shown to be invalid by the following statement from *Wilson & Company* v. *Hartford Fire Ins. Co.,* 300 Mo. 1, l. c. 36-37:

"Judgments held not to be a bar to another action because not rendered on the merits, after an exhaustive review of the cases by leading text-writers, as classified as follows: * * *

2. Where he has misconceived his action. * * *

5. Where the first suit was improperly brought.

6. Where the matter in the first suit is ruled out as inadmissible under the pleadings (Smith's Leading Cases 673; 1 Freeman, Judgments (4 Ed.), Sec. 263, p. 479, and cases cited),

and cases cited on page 35 of the petition for certiorari.

IV.

The law of Missouri is incorrectly stated by respondent on pages 19 and 20, with reference to limitations. It ignores the real question decided in *Gibson* v. *Ransdell,* 188 S. W. 2d 35, l. c. 37, on June 4, 1945, stating the law of Missouri as it has always been:

"(2) It is well settled that, if the *petition* shows upon its face that plaintiff's cause of action is barred by the statute of limitations, this point may be raised by demurrer. *Ludwig* v. *Scott,* (Mo. Sup.) 65 S. W. 2d 1034, 1035; *Herweek* v. *Rhodes,* 327 Mo. 29, 34 S. W. 2d 32; *Burrus* v. *Cook,* 215 Mo. 496, 503, 114 S. W. 1065; *Dennig* v. *Meckfessel,* 303

Mo. 525, 261 S. W. 55, 58. But the *particular statute* relied upon must be pointed out. *Knisely* v. *Leathe,* 256 Mo. 341, 359, 166 S. W. 257."

The latest decision of this Court on the question, to-wit: that in *Guaranty Trust Co. of New York* v. *York,* 89 L. Ed. 1418, l. c. 1424, holds that if a litigant waives the particular statute of limitations on which he relies by failing to plead it, then it is waived forever and must be so regarded in the federal as in the state courts. The following is the language of this Court:

> "The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there.[5]
>
> 5. "The statute may be waived, *Peoples Trust Co.* v. *O'Neill,* 273 N. Y. 312, 316, 7 N. E. 2d 244, and must be pleaded, *Dunkum* v. *Maceck Bldg. Corp-* 227 App. Div. 230, 237 N. Y. S. 180."

V.

Respondent claims that since it alleged that the petition failed to state a claim, then that limitations could be raised by motion to dismiss, on the theory that a general demurrer would lie, has no application for the reason that the District Court correctly stated what the issues involved were (last Par. 49 of Abstract). And in the first paragraph after that (50) the petition contained a small "needle" consisting of a statement of a cause of action or valid claim.

Since respondent did not appeal from that holding, he cannot be heard to urge that the petition failed to state a claim. *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 227.

VI.

The claim that Congress can, by the enactment of Sec. 72, U. S. C. A., authorizing removal of suits

> "* * * except suits removable on the ground of prejudice or local influence"

authorize the artificial person known as the respondent, by filing a petition and bond, compel the State court, in a suit brought by a citizen of the United States, to comply with the command of the act of Congress that

> "It shall then be the duty of the State court to accept said petition and bond and proceed no further in said suit"

is merely a contention that an act of Congress can relieve a State court of its obligation to obey Clause 2 of Article VI of the Constitution of the United States, providing that

> "This Constitution and the laws enacted pursuant thereto shall be the supreme law of the land, and the judges in every State shall be bound thereby."

On page 38 of its brief respondent admits that the petitioner is a citizen of the United States and says:

> "Petitioner is a 'citizen of the United States,' only to the extent and purpose that a *State* (not the Acts of Congress) may not take away his 'privileges and immunities' by the *passage and enforcement of any state law.*"

The italicized language in the above sentence is not the language of Section 1 of the XIVth Amendment, for that language is

> "No State shall make or enforce any law * * *"

The respondent uses the word "and" in lieu of the word "or" in the Constitution, and respondent inserts the word "state" between the words "in" and "law" in said sentence, while there is no such qualifying word in the Constitution.

The claim on page 38 that petitioner's right as a citizen of the United States to institute and maintain a suit in a State court is not derived from the Constitution and laws of the United States, and therefore not protected by the XIVth Amendment. *Blake* v. *McClung*, 172 U. S. 239, says, l. c. 252:

> "* * * the object of the constitutional guaranty was to confer on the citizens of the several states 'a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions.'
>
> The principles have not been modified by any subsequent decision of this court."

Respondent's contention is that Congress is given power to compel a State to violate the privileges and immunities clause of the XIVth Amendment by compelling it to deny to a citizen of the United States the right either to institute or maintain a suit against a non-resident citizen. But the XIVth Amendment itself, by Section 5 thereof, limits the power of the Congress to legislation *enforcing* same. Thus:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

On page 38 respondent says:

> "If the question here were one involving the right of a citizen of some other state to use the courts of Missouri, then a question under the Fed eral Constitution might arise."

The above statement by respondent is in conflict with *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261.

Since the right of the citizens generally to bring a suit in a State court was regarded as a privilege and an immunity of the general citizens of the country under Clause 2 of Article IV of the Constitution from the beginning, then, under the interpretation placed on the XIVth Amendment by this Court in *Colgate* v. *Harvey*, 296 U. S. 404, and the cases cited therein, those privileges and immunities now belong to citizens of the United States as such, and cannot be denied by the court of any State, even if required to do so by an act of Congress. And this, because the Constitution is the supreme law. This Court there said, l. c. 431:

> "The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to abridge the gap left by that article so as also to safeguard citizens of the United States."

Respectfully submitted,

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No. 564.

In the Supreme Court of the United States

October Term, 1945.

BOYD L. KITHCART, *Petitioner*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, *Respondent*.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

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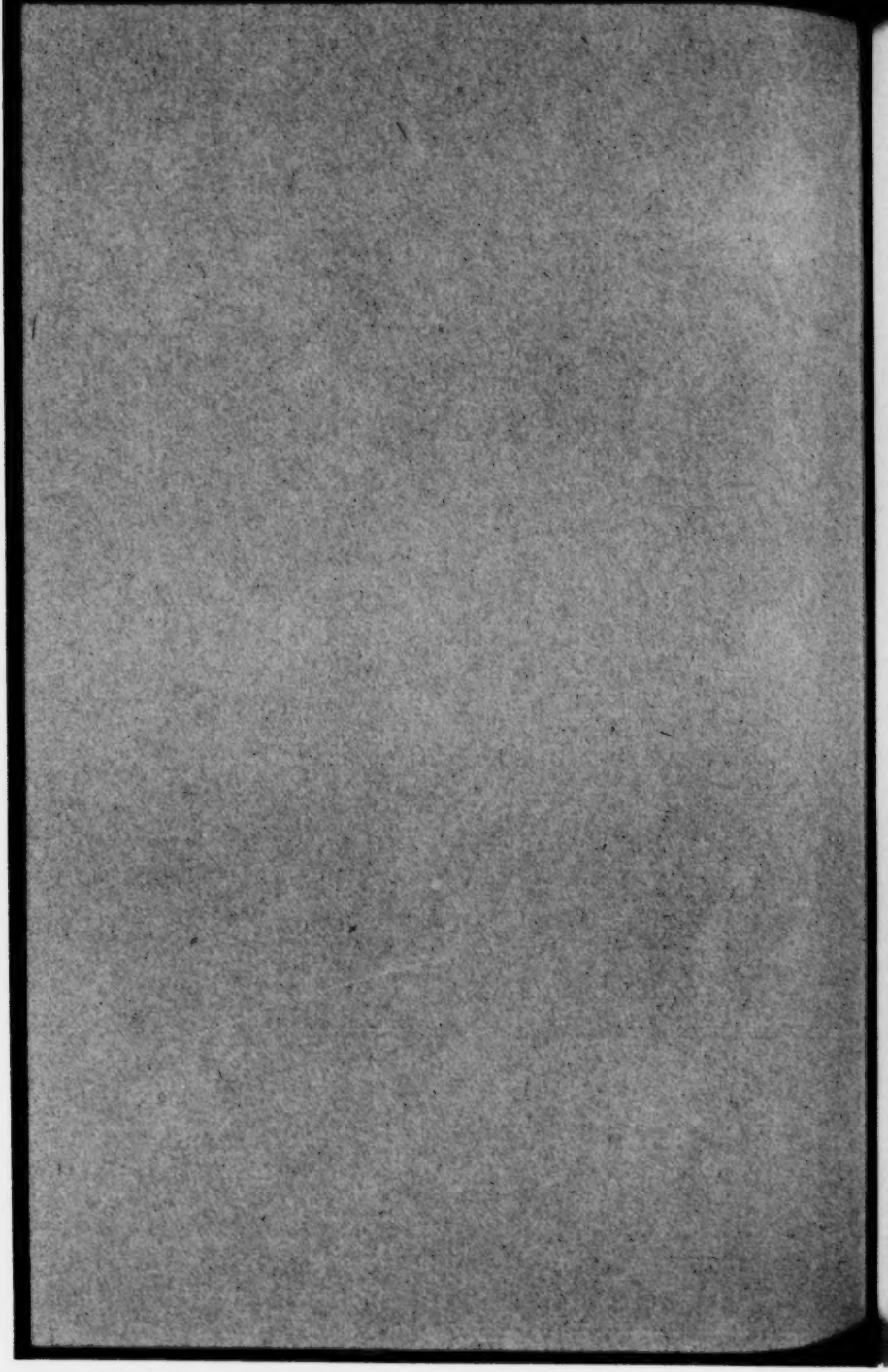

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In the Supreme Court of the United States

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PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

Now comes petitioner and respectfully prays this Honorable Court to grant him a rehearing herein for the reason that the conflicts between the decisions and opinions of the lower court and the importance of the questions involved with reference to uniformity of the decisions and opinions of the courts necessitates the issuance of the writ.

I.

Because the Circuit Court of Appeals' opinion approved the opinion of the District Judge denying reformation on the ground that the other suits on the policy as it stood

were *res judicata* and said decision is in conflict with the decisions of this Court in *Northern Assurance Co.* v. *Grandview Building Association,* 203 U. S. 106, and *Leithauser* v. *Hartford Fire Insurance Co.*, 316 U. S. 663, denying certiorari in *Leithauser* v. *Hartford Fire Insurance Co.,* 124 Fed. (2d) 117—especially in view of the fact that the Circuit Court of Appeals, after finding that respondent's fraud, coupled with petitioner's mistake, prevented the accrual of the suit for reformation from June, 1929, until May, 1933; and then found that respondent's overt acts in the trial at law, denying knowledge of or possession of the sound risk agreement and denying that its agent, Denison, was employed by it in June, 1929, at the time of the making of the contract, and denying that he had either employment or authority from respondent to negotiate insurance contracts, operated to cause the cause of action for reformation to accrue notwithstanding said acts were merely continuations of the original misrepresentations and further prevented the accrual of said action.

II.

The opinion of the Circuit Court of Appeals stating the Missouri law to the effect that a cause of action for reformation on the ground of mistake accrued on delivery of the policy, but nevertheless postponing the date of the accrual of the right to reform this policy until the trial of the law action in 1933 found that respondent's fraud, as alleged in the petition, preventing the accrual of the cause of action for reformation for nearly four years, and failed to note that the petition alleged that fraud prevented accrual of said cause of action by the representations before the trial, and testimony at the trial, that respondent had no knowledge of the sound risk agreement

which would bind it thereto or make it responsible for the fraud of Denison in negotiating the sound risk agreement. Whereas, under the provisions of the Missouri statute of limitations, Sections 1012, 1013 and 1031, the cause of action for reformation could not accrue by reason of the matters and things which occurred at the trial, for the reason that the acts of the respondent at said trial merely supplemented the fraud, which prevented the action for reformation from accruing before said trial by adding additional misrepresentations to those which had theretofore prevented the cause of action from accruing. That by so doing respondent postponed the accrual of the cause of action for reformation until petitioner discovered on February 25, 1939, that respondent had executed and had knowledge of its sound risk agreement with petitioner. And that the District Court and Circuit Court of Appeals were without jurisdiction to deny to petitioner the protection of Section 34 of the Judicial Act, same being Section 725, Title 28, U. S. C. A., with reference to said statutes of limitation.

III.

Petitioner could have recovered in the state court in which he instituted the action at law to recover on the policy, because under the law of Missouri as applied to insurance contracts the sound risk agreement was admissible in evidence as a waiver of all provisions of said policy eliminated therefrom by the sound risk agreement. The removal enabled respondent to invoke Federal Court law which was different from the Missouri law represented to petitioner and thus defrauded petitioner and prevented the accrual of his action for reformation.

And petitioner respectfully attaches hereto suggestions in support of this motion, from which the said conflicts

more fully appear, and the lack of jurisdiction on the part of the Circuit Court of Appeals and the District Court to render the judgments sought to be reviewed and reversed herein.

Wherefore, petitioner respectfully prays this Honorable Court to reconsider petitioner's petition for certiorari, and on such reconsideration to order the issuance of its writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, as prayed in the petition for same.

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Attorneys for Petitioner.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

The Court of Appeals, in its opinion, stated (79):

> "The trial court rested its dismissal or summary judgment-order on the ground that the insured's right to seek reformation was *res judicata.*"

The Circuit Court of Appeals thereupon gave effect to the legal application of the doctrine of *res judicata* by the District Court by affirming it. Both decisions therefore conflict with the decisions of this Court in *Northern Assurance Co.* v. *Grandview Building Association,* 203 U. S. 106, and the decision of the Circuit Court of Appeals for the Sixth Circuit in *Leithauser* v. *Hartford Fire Ins. Co.,* 124 Fed. (2d) 117. In that case the Court of Appeals for said circuit held that, notwithstanding its own decision in the same entitled case, 78 Fed. (2d) 320, in an action at law on the policy, had affirmed the judgment of the district court denying a recovery thereon, wherein the insured sought to introduce evidence of an agreement that both parties agreed that they waived a provision of the policy forbidding insurance if the property insured was not owned by the insured but was merely leased. The policy contained a provision on that subject similar to provision 2 of the policy here involved incorporated in the opinion of the Court of Appeals.

At the trial of the action at law the insured did exactly as did petitioner herein, to-wit: he sought to prove that before the issuance of the policy the insurance agent was fully advised of the fact that the insured was not the owner but a lessee and agreed to waive said provision. The following excerpts from both opinions correctly state

the law, which both lower courts herein should have applied to the issues. In *Leithauser* v. *Hartford Fire Ins. Co.*, 78 Fed. (2d) 320, it was held that:

> "Insured cannot incorporate into policy by parol series of unrelated documents to effect change in policy's terms." (Syl. 2.)

> "Insurer's acceptance of premiums on fire policy after being advised by agent's report that building stood upon leased ground held not waiver of provision avoiding policy if insured did not own property in fee simple, where policy also provided that terms thereof should not be waived except in writing upon policy or attached thereto." (Syl. 3.)

This Court denied certiorari in 296 U. S. 645, wherein a review was sought of the judgment in said action at law against the insured.

Thereafter in a new suit for reformation (124 Fed. (2d) 117) the same court permitted reformation of the policy. The petition there prayed that the court include therein the words:

> "'It is agreed and understood, anything in this policy to the contrary notwithstanding, that the property insured by this policy is located on ground not owned by the insured in fee simple,' or words of like import."

In reversing the judgment denying the prayer the court, discussing *Northern Assurance Co.* v. *Grandview Building Ass'n*, 203 U. S. 106, said:

> "The court expressly ruled that the former decision was not an adjudication that the policy could not be reformed, saying: 'It was rendered in an action at law and only decided that the contract could

not be recovered on as it stood, or be helped out by any doctrine of the common law.' This is enough to say on the question of *res judicata*.

"The judgment in the first Leithauser suit was not conclusive of the second. While the parties were the same in each case, the causes of action were not."

As to election the court said:

"Leithauser did not select, in the first case, one of two inconsistent remedies. He tried to incorporate into the policy the same daily report and related matter used later as the basis for reformation. Our decision in effect was that this procedure offered him no remedy at all. He undoubtedly thought that it was a remedy, but when he was confronted with the judicial determination that it was not, there is nothing in the law of election to bar him from pursuing the right one."

This Court denied certiorari in 316 U. S. 663, wherein the judgment granting reformation was sought to be reviewed.

So that it appears that the judgment of the Circuit Court of Appeals herein, approving and affirming the judgment of the District Court on the ground of *res judicata* is in conflict, not only with the decision of this Court in *Great Northern Assurance Co.* v. *Grandview Building Ass'n*, 203 U. S. 106, and *Baumhoff* v. *Railway*, 205 Mo., l. c. 268, 267, but is also in conflict with said decision of the Court of Appeals in said Leithauser case, 124 Fed. (2d) 117, and with the decision of this Court in 316 U. S. 663, and necessitates the issuance of the writ of certiorari in and of itself. This for the reason that the opinion of the District Judge in *Kithcart* v. *Metropolitan Life Ins. Co.*, 62 Fed. Supp. 93, is an incorrect opinion of

a Federal Court, circulating as the federal law of this country, to the detriment of litigants, and tending to cause the public to lose faith in their national courts.

The opinion of the Circuit Court of Appeals has a like effect since it states the basis on which the judgment was rendered and affirms it, especially in view of the fact that its opinion finds that no action for reformation accrued to petitioner for nearly four years after respondent delivered the policy to him. And, of course, such accrual could have been prevented only by respondent's fraud and petitioner's mistake.

In view of the fact that the conduct of respondents at the trial in May of 1933 is alleged to be merely an additional overt act, pursuant to the conspiracy alleged on page 23 of the record, it merely further operated to deceive petitioner as to Denison's authority and employment by respondent during June, 1929, and to further deceive petitioner as to respondent's knowledge that it had made a sound risk agreement as a part of its contract with petitioner.

Respondent's admissions in its brief in opposition to petition for certiorari establish that the judgments in the prior litigation are not *res judicata*.

The opinion of the Court of Appeals states:

> "The insured had brought suit in 1931 on the policy as it stood" (74).

Respondent agrees the first suit "was at law on the accident policy" (R. Br. 3). In 88 Fed. (2d) 407 it is declared that the first equity suit was a proceeding "in the nature of a bill of review" to set aside the judgment in the action at law for fraud (l. c. .....). 119 Fed. (2d) 497 holds that the second equity suit sought exactly the same

relief as the first, and that the judgment in the first was *res judicata,* and that, even had respondent's executive officers approved or signed the sound risk agreement, it would not be competent evidence; that it would be inadmissible if offered on the issues in the suit at law, all in accordance with the erroneous federal rule condemned in *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64.

The two actions for damages were dismissed, so there was no judgment.

Therefore, the claim in respondent's brief that the action at law based on the part of the contract described by the Court of Appeals as "the policy as it stood," and the two suits in equity to set aside the judgment on the policy as it stood, were based upon the same cause of action as this reformation suit, is untenable. Said statements from the opinions of the Court of Appeals refute respondent's contention as to its said claim.

Justice Holmes of this Court, in *Northern Assurance Company* v. *Grand View Building Association,* 203 U. S. 106, decided the exact question here involved and, since the opinion is short, we reproduce it:

> "This is a bill to reform a policy and recover upon it as reformed. An action at law upon the same instrument, between the same parties, has come before this court heretofore, 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133. In that case it was held that the plaintiff could not recover. The question before us at the present time is whether the Supreme Court of Nebraska failed to give full faith and credit to the judgment of the former case by holding that it was no bar to the relief now sought. (Neb.) 102 N. W. 246.
>
> "The policy was conditioned to be void in case of other insurance, unless otherwise provided by agreement indorsed or added; and it stated, in substance, that no officer or agent had power to waive the con-

dition except by such indorsement or addition. There was other insurance and there was no indorsement. The plaintiff alleged a waiver and an estoppel. The jury found that the agent who issued the policy had been informed on behalf of the insured and knew of the outstanding insurance. But this court held that the attempt to establish a waiver was an attempt to contradict the very words of the written contract, which gave notice that the condition was insisted upon and could be got rid of in only one way, which no agent had power to change. The judgment based upon this decision is what is now relied upon as a bar. *Metcalf* v. *Watertown,* 153 U. S. 671, 676, 38 L. Ed. 861, 863, 14 Sup. Ct. 947; *Hancock Nat. Bank* v. *Farnum,* 176 U. S. 640, 645, 44 L. Ed. 619, 621, 20 Sup. Ct. Rep. 506.

"Whether sufficient grounds were shown for the relief which was granted is a matter with which we have nothing to do. But the state court was right in its answer to the question before us. The former decision, of course, is not an adjudication that the contract cannot be reformed. It was rendered in an action at law, and only decided that the contract could not be recovered upon as it stood, or be helped out by any doctrine of the common law. If it were to be a bar it would be so, not on the ground of the adjudication as such, but on the ground of election, expressed by the form in which the plaintiff saw fit to sue. As an adjudication it simply establishes one of the propositions on which the plaintiff relies—that it cannot recover upon the contract as it stands. The supposed election is the source of the effect attributed to the judgment. If that depended on matter *in pais* it might be a question, at least, as was argued, whether such a case fell within either U. S. Const., Art. 4, Sec. 1, or Rev. Stat., Sec. 905, U. S. Comp. Stat. 1901, p. 677. It may be doubted whether the election must not at least necessarily appear on the face of the record as matter of law in order to give the judgment a standing under Rev. Stat., Sec. 905.

"We pass such doubts, because we are of opinion that, however the election be stated, it is not made out. The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them and put them on one side, as was done in *Washburn* v. *Great Western Ins. Co.,* 114 Mass. 175, where this distinction was stated by Chief Justice Gray. Its choice of law was not an election, but an hypothesis. It expressed the supposition that law was competent to give a remedy, as had been laid down by the Supreme Court of Nebraska and the Circuit Court of Appeals for the circuit. *Home F. Ins. Co.* v. *Wood,* 50 Neb. 381, 386, 69 N. W. 941; *Fireman's Fund Ins. Co.* v. *Norwood,* 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71. So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could effect the same result. It did demand the result, and showed by its pleadings that the path which it did choose was chosen simply because it was supposed to be an open way. *Snow* v. *Alley,* 156 Mass. 193, 195, 30 N. E. 691.

"A question argued as to the obligation of the contract having been impaired by a statute as construed was not taken below, and is not open here.

"Decree affirmed."

The law as there declared was incorporated into the jurisprudence of Missouri in *Baumhoff* v. *Railroad,* 205 Mo. 248, l. c. 268:

"In getting at ultimate right it has been held that a suit for specific performance of a contract, dismissed on hearing on the merits, is not a bar to an action at law between the same parties to rescind the contract and recover back money paid under it. (*Ballou* v. *Billings,* 136 Mass. 307.) The judge writing that case, Oliver Wendell Holmes, later and now a

member of the U. S. Supreme Court, spoke for that court in an opinion in *Northern Assurance Co.* v. *Grand View Building Association,* 203 U. S. 106, holding that a suit at law to recover on an insurance policy, in which plaintiff was denied recovery as the policy stood, is not an adjudication that the contract of insurance cannot be reformed in an after suit in equity. The first suit had proceeded on the theory that a recovery could be had without reformation; and in disposing of the question of election, Justice Holmes epigramatically said: 'Its (plaintiff's) choice of law was not an election but an hypothesis'."

At l. c. 267 in said case, the Missouri court said:

> "Where the *cause* and *object* of both action are the same, the judgment in the prior bars the subsequent suit. When the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action, but the verdict is matter of evidence to prove the point."

The purpose of the reformation suit is stated in the opinion of the Court of Appeals herein (75-76) as follows:

> "The purpose of the present action, in substance, is to have inserted in the policy, through reformation, a provision to the effect that it was agreed at the time the insurance was written (1) that the insured was then 'of sound mind, sound body, (and) good health'; (2) that the insurer had investigated and 'determined conclusively' that such was the fact; (3) that the insurer bound itself not to 'use any prior evidence to the contrary thereof in any legal proceedings'; (4) that the insurer was 'hereby estopped from all objection that any prior mental or bodily diseases or infirmity contributes to any future disability of the (insured) after said date'; and (5) that

> the fact that such a special provision was intended to be and had been made a part of the insurance contract should be 'sufficiently evidenced' by the mere delivery of the policy. The petition alleges that the provision had been drawn up between the insured and the insurer's agent and had been forwarded to the insurer's home office with the insured's application and that by the insurer's acceptance of the application and the issuance of the policy the provision had become a part of the actual contract even though it had been omitted from the language of the policy."

On page 22 of its brief, respondent admits that five separate and distinct issues were submitted to the jury in the action at law. Respondent then, proceeding upon the basis of its misstatement that the reformation suit and the action at law, and the suits to get relief from the judgment in the action at law are the same suit, made the following statement on said page 22 of its brief:

> "All these issues (the five above named by respondent (22)) were fully and painstakingly covered and submitted in the charge to the jury (61-77, 11880). The verdict was a *general verdict* (61, 11880). The suit was one upon this same policy for indemnity for the same alleged accident. A determination against plaintiff on *any one* of the above issues would have been (and is) conclusive against him as to *any* and all right of recovery. A *general verdict,* such as was rendered there, concludes *all issues* against the plaintiff." (Italics respondent's.)

If the preceding suits and the reformation suit were based on the same cause of action, the above statement would declare the applicable law. On page 32 of its brief respondent admits that the law, as thus stated, applies only to consecutive suits based on the same cause of action, thus:

> "The Missouri courts have long recognized the usual rules of *res adjudicata,* namely, that a judgment in a prior suit on the same cause of action is *res adjudicata* on all matters litigated and all matters which might have been litigated therein * * *"

and then, realizing that that rule does not help it and has no application, it sets out the rule and Missouri authorities applying it *where the subsequent suit is on a different cause of action* (italics ours) * * * by saying:

> "* * * and also that a prior judgment is *res judicata* as to matters actually litigated therein, *even in a subsequent suit on a different cause of action.*"

Why did respondent insert the latter rule as to *a different cause of action?* It says, in the preceding 32 pages of its brief, that the *reformation suit in equity* wherein petitioner seeks to have the court add the "sound risk" agreement to the "policy," thus reforming and putting together the *contract actually made by the parties* but through mistake of petitioner and fraud of respondent not attached to each other is the *same contract* as that involved in the *action at law,* which the Court of Appeals says was brought "on the policy as it stood" (74). This is admitted by respondent on page 3 of its brief for it says that the action was

> "* * * a suit at law by this petitioner as plaintiff against respondent on the accident policy in question."

The reason for the insertion of the rule by respondent, on page 33 of its brief, as to matters (not which *might have been* but *which were actually litigated*)

> "* * * *even in a subsequent suit on a different cause of action*" (italics ours)

is that it fully appreciates that a suit to reform a contract by attaching its separate parts together is a different suit from a mistaken suit to recover on one of the parts of the contract, and that a mistaken action at law on the part known as the policy is not *res judicata* on an issue as to whether that policy and the sound risk agreement should be attached by a decree in equity (203 U. S. 106). For issues in the suit on the policy did not include the issue requiring reformation.

The "subject matter" in the former suits was on "the policy as it stood" (74), while the subject matter of the reformation suit is the *actual contract as made.* That is, the policy and sound risk agreement.

> "The record of a former suit between the same parties is not conclusive unless the subject matter passed on in the former suit be the same with the dispute in the case at bar."
>
> (*Clemens* v. *Murphy,* 40 Mo. 121; *State* v. *James,* 82 Mo. 509.)

And so the law of Missouri, as declared by its Supreme Court as recently as November 5, 1945, in *In Re Brewer's Income Tax,* 190 S. W. (2d) 248, contradicts respondent's contention that

> "An adverse ruling on one of these issues (or certain others) would have forever foreclosed a recovery, and would render a 'reformation' wholly immaterial (R. Br. 23).

For respondent admits that it does not know which "issue" (of the above) was the basis of the general verdict. It preceded the above statement by the language:

> "The jury may have disbelieved the plaintiff entirely, finding that there was *no accident;* it may have

> found that he was *never disabled* within the meaning of the policy from any cause; it may have found that he had given *no sufficient notice* of accidental injury, which was one of the contested issues in the case." (Italics respondent's.)

In Re Brewer's Income Tax, supra, l. c. 250, pointed out that the judgment there, as here, was general

> "• • • while both the statute of limitations and nontaxibility of income were set up as defenses."

In other words, there were *two issues* and a *general judgment* in the Brewer case. Holding that the former judgment was not *res judicata,* the Supreme Court of Missouri in the Brewer case proceeds:

> "Where several distinct questions are presented by the pleadings, either of which might have been the basis of the judgment, and it does not appear upon which the judgment is based, the judgment is not conclusive when one of these questions is presented in a subsequent different suit based upon another separate and distinct transaction." 34 C. J. 922, Sec. 1330 American Law Institute Restatement of Judgments, p. 306; *State ex rel. Waters* v. *Hunter,* 98 Mo. 386, 11 S. W. 765; *American Paper Products Co.* v. *Aetna Life Ins. Co.,* 204 Mo. App. 527, 223 S. W. 820; *De Sallor* v. *Hanscome,* 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956. See, also, *State ex inf. McKittrick ex rel. City of Trenton* v. *Missouri Public Service Corp.,* 351 Mo. 961, 174 S. W. (2d) 871. That is the situation here."

In *Paper Products Co.* v. *Aetna Life Ins. Co., supra,* l. c. 536, it is said, quoting Mr. Justice Field of this Court:

"If it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the matter will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

l. c. 537:

"Where a judgment may have proceeded upon either or any two or more different and distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact, must show affirmatively that it went on that fact, or else the question is open for a new contention. * * *

"It is the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment (*De Sollar* v. *Hanscome*, 158 U. S. 216; *Callaway* v. *Irwin*, 123 Ga. 344). For these reasons the plea of former adjudication cannot be sustained."

The District Court, evidently following the discarded rule of *Swift* v. *Tyson*, 16 Pet. 1, as to questions of general law, refused to follow the law of Missouri in accordance with its duty as declared in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. But even the rule of *Swift* v. *Tyson* did not justify its ruling, for this Court in the De Sollar case recognized the same rule as the Missouri courts.

The Court of Appeals, though the question was duly presented by petitioner, approved of said judgment by failing to reverse it.

So that both lower courts, as to this question, denied petitioner the benefit of Section 34, or 725 U. S. C. A. Tit. 28, and ruled that he was not entitled to its protection.

This both lower courts were without jurisdiction to do under the command of said statute, as pointed in both *Swift* v. *Tyson,* 16 Pet. 1, and *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and the countless cases following same. The judgments of the lower courts so palpably exceeded their jurisdiction that petitioner in his brief in support (p. 38) called this Court's attention to Section 377, Tit. 28 U. S. C. A., as a section enabling this Court to exercise its appellate jurisdiction included in Section 347, in the event it found that Section 347 did not authorize it so to do.

The removal to the federal court enabled respondent to escape being bound by its waiver and estoppel agreements, and it did so by invoking the rule of general law then applied in the federal courts under the heresy of *Swift* v. *Tyson,* to the effect that a waiver cannot be shown in the federal court on any kind of contract unless it be pleaded. And in any event, even if pleaded, it could not be shown in the action at law in the federal court, *Leithauser* v. *Hartford Fire Ins. Co.,* 78 Fed. (2d) 320.

But respondent, fully appreciating that under the law of Missouri, as declared by this Court and U. S. Supreme Court, the judgment in the action at law is not *res judicata,* seeks to claim that the two suits in equity reported in 88 Fed. (2d) 407 and 119 Fed. (2d) 497 are *res judicata.* On page 24 of its brief it makes the incorrect statement:

> "In the first equity suit it was alleged that such agreements were *oral;* in the second, it was claimed for the first time (in 1940) that they were contained in *written documents,* elaborately described." (Italics respondent's.)

But the first equity petition alleged concealment of records, thus establishing that the waivers were in writing.

On page 24 of its brief, respondent says:

> "In the prior equity suits plaintiff alleged * * * the defendant * * * waived all prior defects * * * the net result in each such case was that the plaintiff claimed and alleged a waiver * * * of all prior defects."

In said brief respondent admits that the subject matter in the previous suits was only the waiver of prior evidence of unsoundness in breach of Clause 9 of the policy. The respondent's own admission proves petitioner now has a different cause of action.

But from page 20 of the abstract of petitioner's petition in the reformation suit it appears that it is based on the question as to whether or not respondent waived attachment of the sound risk agreement to the policy, and thereby prevented itself from availing itself of the alleged breach of provision 2 by its agreement made before the delivery of the policy, that the sound risk agreement did not need to be attached thereto; and as to the misrepresentation made with reference to the federal law, under which federal law it became necessary to have said sound risk agreement attached to the said policy.

The said representation was correct as to the law of the State of Missouri, and it became false only by reason of the fact of removal of the action at law to the federal court, which enabled respondent to invoke the protection of the federal law, and deprived petitioner of the protection of the Missouri law.

It appears from the petition in the first equity suit that the alleged waiver referred to therein was a waiver of the mental disease of Clause 9 of the policy. Petitioner's petition, as above quoted, thus declared that the alleged waiver was a waiver of a different clause of the policy, from standard provision 2, which the opinion of the Court of Appeals expressly states is the basis of the reformation

suit. This is shown by the following from page 76 of the record:

> "The reason given for the present attempted reformation is that the insured has been denied the right in his previous litigation to make proof of this special provision as part of his contract, in view of the clause in the policy that 'no change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed hereon'."

In *Boyce* v. *Christy*, 47 Mo. 70, the law is thus stated:

> "When the petition in an action on a special contract contains several independent counts, alleging various breaches, the investigation of which involves separate inquiries and findings, such breaches should be held to be independent causes of action, notwithstanding they arose on the same contract."

On pages 29 and 30 of its brief in opposition, the respondent said:

> "The so-called 'reformation' which plaintiff seeks would not be a reformation of the policy at all. It would, in substance, change an accident policy (strictly limited to such) to a general health policy covering disability from practically any cause."

Such attachment of the sound risk agreement to the policy would not extend the coverage of the policy to any other cause of disability which happened after delivery of the policy, but would only make the contract serve its mutually intended purpose of insuring the petitioner as a sound risk on the date of application on June 14, 1929.

II.

The fact that the Court of Appeals found that the action for reformation did not accrue on the date of delivery of the policy on June 25, 1929, and found that under the Missouri law if the failure to attach the sound risk agreement was due to mistake only said action would accrue on said date, established that the said court found that respondent's fraud had prevented such accrual for the ensuing four years. And consequently the fact that respondent continued this fraud by its conduct at the trial in further misrepresenting the facts to petitioner and the court, instead of making the action for reformation accrue, prevented petitioner from having the knowledge of respondent's knowledge of the sound risk agreement until February 25, 1939, when the action for reformation was caused to accrue by the knowledge petitioner then obtained as shown by affidavits on file in this Court in Cause 789, October term, 1941.

The Court of Appeals, as shown by its opinion, acted in excess of its jurisdiction and beyond same, in that it failed to give effect to Section 34 of the Act of Congress of 1789, now Section 725, Title 28 U. S. C. A., commanding that:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treatries, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply,"

in that it failed to give to petitioner the benefit of Sections 1012, 1013 and 1031, R. S. Mo. 1939, which prevented the action for reformation from accruing under the facts, until on or after February 25, 1939. Section 1012 is the first section of Article IX of Chapter 6, R. S. Mo. 1939, and is the basic provision of the 30 sections in said Article

IX, which deal with limitations of personal actions. Said Section 1012 is as follows:

> "Sec. 1012. Period of limitation prescribed.
> Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: *Provided,* that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

Said proviso was added in 1919.

Said section must be construed in connection with Section 1031, which is as follows:

> "Sec. 1031. Limitation not to be extended by improper acts of defendant.
> If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented."

Both of said sections must be construed in connection with Section 1013, which is as follows:

> "Sec. 1013. What actions shall be commenced within ten years.
> Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of con-

veyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of action shall accrue; third, actions for relief, not herein otherwise provided for."

The opinion of the Court of Appeals points out that Section 1013 provides the general limitation on suits for reformation in Missouri, and limits such suit to 10 years. The opinion then says (77):

> "*Stark* v. *Zehnder*, 204 Mo. 442, 102 S. W. 992, 994. In cases of mistake or of omissions not due to fraud, the reformation right ordinarily is deemed to have accrued *at the time the mistake or omission occurred. Hoester* v. *Sammelmann, supra; Stark* v. *Zehnder, supra.* But even if the situation is one where the statute may not previously have commenced to run, the denial of a known right or status upon an assertion of it clearly will put the statute in operation. Cf. *Carlin* v. *Bacon*, 322 Mo. 435, 16 S. W. (2d) 46, 48, 69 A. L. R. 1."

The Court of Appeals correctly declares the applicable Missouri law when it says that

> "* * * the denial of a known right or status upon an assertion of it will clearly put the statute in operation" (77).

But why did the Court of Appeals not apply the principle stated by it that (77):

> "* * * the reformation right ordinarily is deemed to have accrued at the time the mistake or omission occurred."

It is evident that it appears from the opinion of the Court of Appeals and its finding that respondent's fraud prevented the accrual of the right to have the policy reformed. In other words, mere mistake on June 25, 1929, could not prevent its instant accrual nor postpone its accrual until May, 1933.

It thus appears from the opinion, in connection with the petitioner's petition, that the Court of Appeals found that the respondent was guilty of fraud which prevented the action from accruing before the trial of the lawsuit in May, 1933. In other words, the finding by the Court of Appeals is that the respondent's fraud prevented the action for reformation from accruing for nearly four years after petitioner received the policy. But the Court of Appeals finds that when the respondent supplemented its overt acts of fraud, pursuant to the conspiracy alleged by petitioner (16, 17, 23), by grosser acts of fraud at the trial of the case, which further prevented petitioner from bringing his suit for reformation, that these gross acts of themselves caused the accrual of the cause of action.

We direct attention to the fact that before the trial and after respondent made the same misrepresentations to petitioner as made at the trial, the said respondent had lulled the petitioner into security and prevented the bringing of the reformation suit (16, 17). The record (15-16) shows:

> "On June 25, 1929, R. G. Danison represented that he was not employed by the defendant on June 14 and 25, 1929, but was then only employed by the debit agent, M. E. Marquis, was then only assisting M. E. Marquis, and that he (Denison) had no authority to sell any policy for defendant, but was selling it for M. E. Marquis, who was defendant's authorized agent, and not selling it himself as assistant manager for defendant. On June 14 and 25, 1929, R. G. Deni-

son represented that M. E. Marquis was not a witness to any part of said application, waivers and estoppels, or signatures of executive officers (fol. 14) thereon, and that defendant did not allow M. E. Marquis to discuss the defendant's private business or correspondence and that M. E. Marquis would not answer any such question if plaintiff asked him any questions about said application and documents contained therein, and M. E. Marquis did not answer any such questions until after February 25, 1939.

"That thereafter, on April 30, 1930, V. D. Marshall and W. L. Magoon represented to plaintiff that they could not remember that R. G. Denison worked for defendant on June 14, 1929, but that they did remember he no longer worked for defendant at said time, and that they did not know which city R. G. Denison had gone to after leaving Kansas City, and that they did not know what he did with said documents of application and waivers or estoppels.

"On October 31, 1931, May 13, 1935, April 23, 1938, and on May 9, 1938, said V. D. Marshall and W. L. Magoon both represented to plaintiff that they could not remember of said application or documents of waiver or estoppel, and that they could not remember of anyone else having said documents in possession of defendant, when on all said dates plaintiff requested the same.

"On February 25, 1939, V. D. Marshall represented to plaintiff that the photostatic application alone as signed by M. E. Marquis was the only application which he could remember in defendant's possession, and was the only one which he could furnish to plaintiff on said date, same being Exhibit 'C'."

The Court of Appeals wholly overlooked the said allegations in its opinion, for, had it read and understood said allegations, it would have known that the fraud which it found prevented the action from accruing before the

trial, also prevented the action from accruing until February 25, 1939.

Furthermore, the Court overlooked the allegation on page 7 that

> "* * * defendant claimed that said copy of the record of said army discharge was procured from the Government pursuant to a 'hunch' of defendant's trial counsel."

It thus appears that respondent not only prevented petitioner from having knowledge that respondent had knowledge of the sound risk agreement later discovered by petitioner after February 25, 1939, to have been executed by the respondent, but it also prevented its own trial counsel from having any knowledge thereof.

Petitioner had no knowledge (16, 17) of any kind that respondent had the knowledge above mentioned which would bind it to the sound risk agreement or make it responsible for the fraud of Denison in negotiation thereof before February 15, 1939.

Petitioner did not know that said written documents were in respondent's possession, because respondent denied all knowledge or possession thereof (16, 17), as above stated, and because petitioner had not seen the signature of any agent of respondent on the sound risk agreement when his signature was appended thereto on June 14, 1929 (9, 10, 11).

Petitioner did not yet know, on February 25, 1939, that the sound risk agreement was in possession of respondent when the application, Exhibit "C" (35), was furnished to him on said date, because the sound risk agreement had been detached therefrom (18). The sound risk agreement, bearing the signatures of executive officers, had not been delivered to petitioner on June 25, 1929 (11).

It further appears that at all times after June 25, 1929, when petitioner asked for a copy of the sound risk agreement, respondent denied all knowledge of possession thereof (7, 16).

It appears that Denison's and petitioner's signatures were both absent from the copy of the application attached to the policy (22, B 33). And, furthermore, the sound risk agreement was signed only by petitioner on June 14, 1929 (10).

The court overlooked the allegation on page 9 of said petition,

> "* * * that it was not until February, 1939, that he could and did discover evidence which had been concealed by defendant, that said agents had signed and approved the following documents and that the defendant's Home Office had received from its agents before delivery of said policy, the following documents, to-wit:"

which included the sound risk agreement.

It appears from the record that petitioner could not discover, from any ruling of any court or any objections made by respondent, that said sound risk agreement was executed, because it was not attached to the policy, because the only objection made and the only ruling of the court was upon the absence of the signatures of agents of respondent (9, 10, 11, 18, 21).

The Court of Appeals overlooked the fact that the petition shows the absence of signatures of any agent of the respondent from said sound risk agreement (9, 10, 11, 21). It nowhere appears in any record that the respondent made any objection, or the court made any ruling at the time of the trial in 1933, that this sound risk agreement was not admissible because it was not attached to the policy.

Petitioner could not discover from the opinion of the Court of Appeals, 88 Fed. (2d) 407, that the sound risk agreement should be attached to the policy, for the court's opinion only revealed that the respondent was not bound by the conversation of a mere soliciting agent.

Petitioner could not discover from the tort suits, dismissed in 1938, anything, because the court did not pass on anything.

The first opportunity for the petitioner to infer that the sound risk agreement must be attached to the policy was from the court opinion in the second equity suit, 119 Fed. (2d) 497, in 1940, 1941, 1942, that the sound risk agreement, even if signed by executive officers, even if produced in evidence by respondent, was not competent evidence in any legal proceeding on the policy as it stood (14, 22).

No court has ever passed on the question of whether the sound risk agreement should be attached to the policy.

Petitioner's belief that respondent had knowledge of the sound risk agreement by holding it in trust, by the false representations of Denison that respondent was holding the sound risk agreement in trust (15), was extinguished by the false representations of Denison and Marshall before the trial in 1933, as alleged on (16, 17). And the misrepresentations to the court at the trial, by respondent itself through counsel and by its witnesses Magoon and Marshall under oath, that they had no knowledge or possession of the sound risk agreement (16, 17), and by the fact that Denison was not present, it was not possible to examine him as to the truth of his representations about respondent's knowledge or possession of said sound risk agreement (21).

Petitioner relied upon and was misled by the testimony of respondent's district manager, under oath, when, dur-

ing the absence from the trial of Denison, he denied that Denison was in respondent's employ at the time of the making of the contract in June, 1929 (16, 17).

Respondent in its brief asserts that the above facts show that petitioner's claim that he was prevented from bringing the reformation action, was based upon lack of evidence, and not on lack of knowledge. (See respondent's brief, page 16.) It there says:

> "The allegations of supposed continuations of the fraud since 1933, of concealments, of 'discoveries,' etc., do not change the picture in any way; at most they relate to matters of *evidence,* not of *knowledge,* for plaintiff's knowledge was complete in 1933, including knowledge of the *claimed* intention of defendant to defraud him." (Italics respondent's.)

The above and foregoing demonstrates that said statement by respondent is in direct conflict with the record in this case. It was by such statement that respondent misled the Court of Appeals and perhaps this Court, and also demonstrates that respondent fully recognizes the truth that the said absence of knowledge, under the statutes of the State of Missouri, prevented the accrual of the cause of action under the proviso of Section 1012 specifically declaring that

> "* * * the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment."

Furthermore, the lack of knowledge by the petitioner was a direct consequence of the improper acts above set forth of the said respondent (16, 17, 11, 9), which operated, under Section 1031, R. S. Mo. 1939, to toll the

statute of limitations, to-wit: Section 1013, and not Section 1014, which had no application to this reformation suit founded as it was on contract and not on fraud as stated by the Court of Appeals.

The representations of Denison, with reference to the applicable law concerning waiver of attachment (20), was true with reference to the law of the State of Missouri, as shown by the following decisions: *Stephens* v. *German Ins. Co.*, 61 Mo. App. 194; *McCulloch* v. *Phoenix Ins.*, 113 Mo. 606; *Andrews* v. *Fidelity Ins. Co.*, 168 Mo. 151; *Langford* v. *Ins. Co.*, 97 Mo. App. 79; *Rickey* v. *German Grantee Town Mut.*, 79 Mo. App. 485.

As pointed out by this Court in *Erie* v. *Tompkins*, 304 U. S. 64, and by the dissenting opinion of Justice Field in *Railway* v. *Baugh*, 149 U. S. 391, 411, the federal court was without jurisdiction to destroy the obligation assumed by respondent in its contract with petitioner.

But by the denial of the petition for certiorari, if such denial stands, then we have a situation wherein petitioner has been denied the benefit, not only of the privileges and immunities clause of the XIVth Amendment, but also of the due process and equal protection provisions of Section 1 of said Amendment; and also by the act of the said court in obeying the Act of Congress authorizing removal to the Federal Court, respondent was enabled to avoid the obligation of its contract under Missouri law.

The Missouri Supreme Court in *Missouri Sav. Bank* v. *Kellems*, 321 Mo. 1, *et seq.*, has ruled that in the situation of petitioner and his relationship to Denison, under the facts made Denison's misrepresentations (20) as to the Missouri law binding on the respondent. And this applied to the law of both Missouri and the law as applied by the federal courts in June, 1929. The fact that the representa-

tion made was true as to the Missouri law, and false as to the then federal law, enabled respondent to defraud petitioner.

But nevertheless, said misrepresentations (20) do not operate to prevent petitioner from having the contract reformed by attaching the sound risk agreement to the policy. On the contrary, such representations in this case establish petitioner's right to reformation.

Since under the Missouri law as found by the Circuit Court of Appeals in its opinion (77), the cause of action for reformation accrued on delivery of the policy on June 29, 1925, unless by reason of respondent's fraud and petitioner's mistake it did not then accrue. And, since the Court of Appeals has found that it did not then accrue, then, before it could find that it accrued at the time of or as a result of the trial of the action at law, it would be necessary for the court to find that petitioner then acquiesced or assented to respondent's fraud. For, in Bispham on Equity, 10 Ed., Sec. 203, p. 345, the principle applicable to this case has been thus stated:

> "The principle may be said to be that where actual fraud is proven, the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud like this, we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."

The law as thus stated is supported by the following decisions of this Court, cited by the author:

> "*Saxlehner* v. *Eisner & Mendelsohn Co.*, 179 U. S. 39; *McIntire* v. *Pryor*, 173 U. S. 38; *McLean* v. *Fleming*, 96 U. S. 245; *Menendez* v. *Holt*, 128 U. S. 514; *Portuondo Cigar Co.* v. *Cigar Co.*, 222 Pa. 116."

The Missouri appellate court, applying its limitation law, cited some of the above decisions of this Court in *Gaines & Co.* v. *Whyte Grocery Co.*, 107 Mo. App. 507, at l. c. 526, said:

> "In *McIntire* v. *Pryor*, 173 U. S. 38, it was in effect held that the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to a plaintiff's claim. The cases analyzed in that opinion make it plain that where actual fraud is shown the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. And in a case of active and continuing fraud it should be satisfied with no evidence of laches that does not amount to proof of assent or acquiescence."

McBeth v. *Craddock*, 28 Mo. App. 380, says:

> "When one by his statements purposely induces another to rely on their truth and forego other sources of information, he cannot escape liability by then suggesting further inquiry."

Scott v. *Haynes*, 12 Mo. App. 596, says:

> "(7) The plaintiff's failure to avail himself of means of knowledge within his reach will not relieve the defendant of his liability, if his representations were intended and did influence the plaintiff not to make inquiry."

The Court of Appeals overlooked the consideration that petitioner's petition alleges a conspiracy to defraud him (23), and also alleges that all of the said acts, including the acts of the respondents at the trial of the action at law, were overt acts pursuant to the conspiracy to defraud.

The singular result is that the Court of Appeals has found that the overt acts of the respondent at the trial of the lawsuit operated to relieve the petitioner from liability instead of clinching its liability to petitioner.

As pointed out by the House of Lords in *Quinn* v. *Leathem*, A. C. 495, with reference to this kind of case:

> "The overt acts which follow a conspiracy form of themselves no part of the conspiracy. * * * they are only things done to carry out the illicit agreement already formed and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished."

The conspiracy is an act in itself, and the overt acts pursuant to the said act of conspiracy continued until the institution of this suit. And, under the law as declared by the Supreme Court of Missouri in *Ruckels* v. *Pryor*, 351 Mo. 819, the conspiracy herein involved was a continuing conspiracy, in which situation the statute of limitations can never apply, as shown by the following language at l. c. 846 from said report:

> " 'The defendants were indicted for setting fire to a certain stock of merchandise for the purpose of securing the insurance thereon. There was evidence of a conspiracy to thus fraudulently obtain the money from the insurance company. But it was urged that the conspiracy ended when the fire took place, as there was no evidence that any attempt was made to collect the insurance money. But the court held that

the conspiracy continued, and was not ended until the insurance money was collected, and there was no evidence tending to show that the purpose of the defendants to obtain the money was abandoned. In other words, the conspiracy to defraud having been established, it will be presumed to continue, and not to be abandoned until its purpose is accomplished.

"'Where the existence of a certain condition or state of affairs of a continuous nature is shown, the general presumption arises that such condition or state continues to exist, until the contrary is shown by either direct or circumstantial evidence, so long as is usual with conditions or things of that particular nature'."

Why did the Court of Appeals ignore the law thus disclosed and, on the contrary, forfeit petitioner's rights under his insurance contract?

III.

The Court of Appeals, notwithstanding its opinion, discloses a finding that respondent's fraud prevented the accrual of the reformation action for four years, yet of its own initiative forfeited and declared a forfeiture of petitioner's rights under the contract which the Court of Appeals found had been alleged to have been made by the parties. Said court was without jurisdiction so to do under the decision of this Court in *Erie Ry.* v. *Tompkins*, 304 U. S. 64, and under law of Missouri. In the leading case of *Shearlock* v. *Ins. Co.*, 193 Mo. App. 430, it was held that a suit on a policy of insurance 17 years after the death of insured was not barred by the statute of limitations. Treating said *statute of limitations* and lack of proof of death, the court said:

> "*Such defenses are generally termed forfeitures;* that is, the plaintiff forfeits his cause of action (or as defendant claims, does not bring it into being) by failure to furnish proofs of loss *or to bring his suit within a certain time.* Forfeitures are not favorites of the law, *and especially of the insurance law.*"

That language is a mere recitation of the time-honored rule as to insurance contracts applied in Missouri. In *Mathews* v. *Modern Woodmen,* 236 Mo. 326, l. c. 342, Judge Lamm said:

> "Again, forfeitures are not favored by the law. *Courts never go out of their way to find them,* but will enforce them when plainly set forth and there can be no two ways about it. They will not be allowed if ambiguities can be fairly resolved against them. Speaking of insurance contracts, it is a just and settled rule that their restrictive terms shall be taken most strongly against the insurer. The doctrine of *contra proferentum* is strictly applied with unaccommodating vigor, and, as said, ambiguities are blandly resolved in favor of the insured. So that, if the contract in suit is open to two constructions, one favorable to the insured and one not, if the insured has acted on the favorable construction, courts will take his view of the contract—being always mindful that the principal obligation (the very life and soul) of a policy is to pay the policy face when the contingency or event happens upon which payment is predicated."

If such rule will be applied to prevent a forfeiture because of "double talk" in an insurance policy, what rule should have governed the Court of Appeals in construing the misrepresentations set forth at great length in the petitioner's pleading? These misrepresentations were found by said court to prevent the accrual of the cause of action for reformation for four years. By what

authority or method of reasoning did it permit itself to conclude that misrepresentations at the trial, to-wit: That respondent had no knowledge of the sound risk agreement which would bind it thereto nor knowledge of Denison's authority which would make it responsible for his fraud in the negotiation of the sound risk agreement? The author of the opinion was formerly a Nebraska lawyer. This explains his failure to give effect to the Missouri law above quoted and caused said Court of Appeals to go out of its way to find a ground on which to forfeit petitioner's rights in his insurance contract. Since neither pleadings nor brief referred to Section 1014, R. S. Mo. 1939, it is manifest that said court went out of its way to find same and to apply it to petitioner's action on contract when it could only be applied to an action on tort by virtue of its own language. The Act of Congress (June 19, 1934, c. 651, § 148, Stat. 1064) authorizing this Court to prescribe rules for the District Courts, declared that:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

The Court of Appeals cited *Guaranty Trust Co.* v. *York,* 89 L. Ed. 1418, in support of its going out of its way to find a Missouri statute of limitation which had never before been applied by a Missouri court to an action on contract because it never applied to such a contract, but only to actions grounded on fraud. The fact that respondent fraudulently concealed its knowledge of the contract which bound it thereto and its knowledge of Denison's authority and acts did not make the reformation suit to reform the contract an action grounded on fraud within the meaning of Section 1014, R. S. Mo. 1939. And so the Court of Appeals by forfeiting petitioner's insurance contract as it did, contrary to Missouri

law, ran counter to the law as stated in *Guaranty Trust Co.* v. *York, supra,* l. c. 1424, when it said:

> "The nub of the policy that underlies *Erie Ry. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of a state court a block away should not lead to a substantially different result."

The fact that the amended petition (which we did not write) was found by Judge Otis to have been inexpertly drawn, did not justify the decisions of the lower courts against petitioner under the rule recognized by all courts, including this, as illustrated by its decision in *Pyle* v. *Kansas,* 317 U. S. 213-216:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. * * * In view of petitioner's inexpert draftsmanship, we, of course, do not foreclose any procedure designed to achieve more particularity in petitioner's allegations and assertions."

The decisions of the federal courts in petitioner's litigation are in direct conflict with the law of Missouri, and are based on the heresy of *Swift* v. *Tyson,* 17 Peters 1.

But yet, nevertheless, under decisions of this Court in *United States* v. *Peters,* 5 Cranch 115, the state court in which the reformation suit was filed could not reform the insurance contract without reference to the said

judgments of this Court. This makes it necessary for even a Missouri court to reform the contract.

How such good judges as Judge Otis and those of the Circuit Court of Appeals are known to be could render such decisions and write such opinions, in direct conflict with the above opinions of this Court, the Supreme Court of Missouri, and that of the United States Circuit Court of Appeals for the Sixth Circuit, is hard to explain.

Said opinions should not be permitted to remain as the purported law of this Nation.

If ever a case of conflict necessitated the issuance of the writ of certiorari, this is the case.

Because of the conflicts between the opinions and decisions of the United States Court of Appeals and District Court and this and the Missouri Appellate Courts in the cases heretofore referred to, we most respectfully submit that a rehearing and the writ sought should be granted.

PAUL E. BINDLEY,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 564.

BOYD L. KITHCART, PETITIONER,

VS.

METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR REHEARING FOR CERTIORARI ON MISTAKE OF PETITIONER'S ATTORNEY.

BOYD L. KITHCART,
Petitioner.

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Now Comes the petitioner and respectfully prays this Honorable Court to grant him a rehearing on his former petitions for certiorari for the reasons that petitioner is now prepared to expose the greatest insurance fraud in the United States, and can explain why respondent sells policies exclusively through agents (3) and refuses to sell policies by mail (17) so as to get control of any evidence at time of application which may prevent recovery on the policy; and for the further reason that the further conflicts between Federal law and Missouri law as herein

set up have so confused the petitioner's eminent attorney that he is incapable of understanding the legal difference between Counts I and II of Plaintiff's Petition For Reformation of Insurance Contract and For Recovery Thereon (3-26); and that such conflicts of law have induced said attorney to make the mistakes of pleading on pages 30 and 36 of Petitioner's Petition For Rehearing of Petition for Certiorari, in which said attorney by mistake has omitted the word "only" three times on said pages where he says "This is a suit on a contract, not on fraud (only)." And such conflicts of law have further induced said attorney to state on page 37 of said petition that he did not write the Petition for Reformation of Insurance Contract and Recovery thereon as set up in the Abstract of Record (1-23). This court has seen fit to grant relief on mistake of attorney as shown by the following authorities, to-wit:

> *Pacific Ry. Co.* v. *Mo. Pac. Ry.*, 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498; *Sanford* v. *White*, 132 Fed. 531: "Courts have thought it proper to grant relief in some cases of misunderstanding or misapprehension on the part of the attorney."

I.

On Res Judicata.

Said attorney does not seem to understand that only Count II, and not Count I, of Plaintiff's petition (3-26) states a cause of action on contract, and not on fraud. Only Count II sets up Petitioner's claim for recovery on the reformed contract of insurance. Only Count II sets up a different claim for recovery from the claim for recovery which was mistakenly supposed to exist on the policy as it stood at the time of the trial in 1933 of case number 8391 (59). The previous suits on the policy as it stood (5, 6, 7, 8, 9) have no effect of *res judicata* on petitioner's claim

for recovery on the reformed contract, where petitioner waits until after the court orders the separate parts of the contract to be joined together before he asks to recover thereon in Count II (25), and where the court waits to pass on the claim for recovery in Count II (25) until after the contract has been reformed as demanded in Count I thereof (24).

The conflict of laws as hereinafter set up has induced said attorney to misunderstand whether the claim for recovery should be stated in Count I or in Count II of plaintiff's petition (3-6). Said attorney believes from the conflicting laws mentioned that in Count I he should ask for recovery on the unreformed contract, before the court has reformed it. He believes that the Federal Court has no jurisdiction, that no decision in the Federal Court in this case will be *res judicata* if the cause is remanded to the state court. And he believes that it is necessary to ask to recover on the unreformed contract in Count I, because the Missouri State Courts have jurisdiction and authority to grant recovery without reforming the policy beforehand. If the Supreme Court does not remand the cause to the State Court, his demand for recovery on the unreformed contract in Count I is mere surplusage which does not bar recovery in Count II on the reformed contract. This theory of the case is misleading to the attorney and to the Court, because there is a probability that the Court might think that the claim for recovery on an unreformed contract has already been adjudicated in the Federal Court if the case is not remanded to the Missouri State Court. Petitioner asks that the demand for recovery on the unreformed contract (24-25) be stricken out as *res judicata* if the case is retained under Federal Jurisdiction and trial be granted on Count II which states the only cause of action on the reformed contract (25).

Said misunderstanding and mistakes of attorney were induced by the following conflicts of law, to-wit:

The first group of laws indicate that the plaintiff's cause of action on fraud in Count I and his cause of action on contract in Count II should be stated in separate counts, and not combined all in one count.

> Missouri Statutes of 1939, Section 917, page 228: "The plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of, First, the same transaction or transactions connected with the same subject of action * * *. But the causes of action so united— must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligently distinguished."
>
> *Hodgson-Davis Grain Co.* v. *Hickery*, 200 S. W. 438: "Under Rev. St., 1909, Sec. 1795, plaintiff cannot join in a single petition count based on cause of action *ex contracto*, and count based on cause of action *ex delicto*."

The second group of laws cited herein induced said attorney to believe that both plaintiff's causes of action on fraud and on contract could both be joined not only in the same petition, but in the same Count I, as follows, to-wit:

> *Smith Engineering Co.* (*Pennsylvania*) v. *Pray*, 61 F. 2d 687, affirming 58 F. 2d 926, and certiorari denied 53 S. Ct. 594, 289 U. S. 733, 77 L. Ed. 1482: "Court of equity, after reforming contract, may proceed to adjudicate rights of parties under reformed contract, although such rights would otherwise have been properly determinable in court of law."
>
> (D. C. Mo., 1938) *Holloway* v. *Federal Reserve Life Ins. Co.*, 21 F. Supp. 516: "The Federal Equity Court, having taken jurisdiction, will afford complete relief, and will do so without regard to precedents."

(C. C. A. Mo., 1918) *Fay* v. *Hill*, 249 Fed. 415, 161 C. C. A. 389: "A court of Equity having obtained jurisdiction of a suit wherein cancellation of a contract of sale was sought will retain jurisdiction to dispose of all controversies between the parties arising out of the transaction."

(C. C. A. Mo., 1906) *In re Blake*, 150 Fed. 279, 80 C. C. A. 167: "Court of equity having acquired jurisdiction, will grant complete relief."

McGowan v. *Parish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing, 1912, *Parish* v. *McGowan*, 39 App. D. C. 184: "A cause properly brought in equity will be retained for all purposes."

Said attorney believed from the above authorities that the Federal Court was different from the Missouri Court in equity proceedings, and that for this reason Count I on fraud and Count II on contract need not be clearly distinguished in plaintiff's petition (3-25), by stating each cause of action in separate counts.

If the Federal Court retains jurisdiction of Petitioner's case, the policy and the sound-risk agreement set up in Count I of plaintiff's petition (10, and Exhibit A, 27, 29; B, 33) as separate documents should each be regarded as false representations which induced plaintiff to enter into the contract as set up in good faith in Count II thereof. If the case is remanded to the State Court, the request to recover on the unreformed contract (24, 25) under the belief that such unreformed contract is not *res judicata* where the Federal Court did not have jurisdiction thereof, should be stricken out, so that the contract may be reformed in Count I and recovered on in Count II, where such reformation is really necessary to protect the petitioner from respondent's fraudulent concealment of evidence which binds the respondent thereto.

Said mistakes of pleading on the part of said attorney do not clearly overcome the *res judicata* of previous suits where he believes that he should ask for recovery in Count I and also believes that he can set up the contract in Count I at the same time he sets up fraud therein. But the petitioner himself had other assistance in dictating said petition (3-26), and Count I is only intended to be of cause of action on fraud, and Count II is only intended to be a cause of action on contract so that if said demand for recovery in Count I be stricken out, it will not be *res judicata* if the case remains for trial in the Federal Court, or even if it be remanded to the Missouri State Court for hearing there.

II.

On Limitations.

Said petitioner's attorney made mistakes on pages 30 and 36 of his Petition for Rehearing where on pages 30 and 36 he says that plaintiff's reformation suit is founded on contract and not on fraud. It was a mistake to omit the word "only" three times after the three words of "fraud" on said pages. The entire suit is not based on contract, only Count II of plaintiff's petition (25) is based on the reformed contract. Before the two express contracts as represented by the policy and the sound-risk agreement have been reformed as demanded in Count I of said Plaintiff's Petition (25) by attachment together into one joint contract as mutually intended by both parties at time of plaintiff's application, each one of said purported contracts is only a false representation which induced the plaintiff to enter into the joint contract as presumed to be in good faith in Count II of said petition (25). Hence, Count I of Plaintiff's petition is grounded entirely on fraud. It was a mistake for said attorney in

speaking of the whole reformation suit not to distinguish clearly between Counts I and II, and specify that he only referred to Count II when he said that said cause was not grounded on fraud.

It is absurdly inconsistent for said attorney to make the mistake of saying that Count I is not grounded on fraud after he has devoted 34 pages of his petition for rehearing to very convincing argument and proof that Count I states a cause of action only on fraud. Such mistake does no harm to the respondent, because Count II demands recovery on the reformed contract, but such mistake does injure the petitioner by overlooking all the fraud in Count I which is intended to overcome the respondent's defense of limitations and laches. This Court should not allow such attorney's mistakes to go uncorrected where such mistakes are obviously incorrect even from the most casual reading of Count I in said plaintiff's petition (3-25). The Court did not permit such a mistake to go uncorrected in the following case, to-wit:

> *Sumner* v. *Rogers*, 90 Mo. 324, 2 S. W. 476: "Under the Code one cannot sue on one cause of action and recover on another. He cannot sue for an injury and recover on a contract, express or implied, or *vice versa*. * * * To permit the plaintiff to hold that the action was not an action for deceit, the trial court would stultify itself, and hold out a premium to counsel to commit a fraud on the court and opposite party, and there can be no certainty in pleading or practice."

The plaintiff's petition in Count I alleges that defendant made false representations (10-20) which prevented the policy and sound-risk agreement from being attached together at the time of delivery of the policy, and other representations (15, 16, 17) which prevented reformation thereof before the present suit was filed (10-20). Said

petition alleges defendant's fraud in negotiation of the contract, and in continuation of such fraud until the present suit was filed (10, 14, 15, 16, 17, 20). Thus Count I is certainly a cause of action on ground of fraud as shown by the following authority, to-wit:

> *Hess* v. *Appleton Mfg. Co.*, (Mo. App., 1912) 148 S. W. 179, 164 Mo. App. 153: "An action for false and fraudulent representations is *ex delicto*, and therefore cannot be said to be founded on contract, though the representations be in writing."

Said eminent attorney misunderstands and misapprehends the laws of pleading which apply to petitioner's causes of action (3-26). Whenever said attorney reads the Federal decisions heretofore set up, he believes that the Federal Equity Court authorizes him to ask for complete relief in Count I as he has done (25) on both causes for reformation and for recovery on the reformed contract. Said attorney mistakenly says that it is not necessary to plead petitioner's cause of action to recover on the reformed contract separately in Count II and thereby allow the trial court an opportunity to order the contract reformed before permitting recovery on it. The petitioner has insisted on Count II being on the reformed contract as separately set up in the petition (2-26) in belief that said attorney's opinion thereon is a mistake on his part.

It is absurdly inconsistent for said attorney to make the mistakes on pages 30 and 36 of Petitioner's Petition for rehearing in which he says three times that this is a suit on contract and not on fraud, and forgets to append the word "only" after the word fraud three times therein. He should state clearly that Count I of plaintiff's petition (3, 25) is only an action on fraud for the reformation of the policy and sound-risk agreement by joining them together by attachment as demanded in Count I (25). He

has proved that Count I only alleges fraud by attempting to invoke Sections 1012, 1014, and 1031 which apply to such fraud. Section 1012 postpones limitations until the damage has been ascertained or is capable of ascertainment. The plaintiff's petition alleges that plaintiff was injured (22) by not having admissible evidence of said sound-risk agreement which would bind the defendant in any legal proceedings on said policy. The conflict of law as set up on page 30 of Petitioner's Petition for Rehearing, in the first complete paragraph therein, is alleged by said attorney to have prevented petitioner from discovering that he was legally injured by non-attachment of the sound-risk agreement to the policy, because the Missouri law as represented to plaintiff was different from the Federal law invoked by respondent by removing the cause to the Federal Court (28 Pet. on Rehearing). Section 1031 postpones limitations until the improper act prevents commencement of the reformation suit, and said attorney has invoked section 1031 on the concealments of defendant's knowledge of the sound risk agreement and defendant's knowledge of R. G. Denison's authority to negotiate the sound-risk agreement which would make respondent responsible for his fraud in negotiating the same (22 Pet. for Rehearing). Said attorney also invokes section 1014 which allows petitioner 10 years to discover the facts of fraud, and five years thereafter to finish discovering the false representations of law before filing suit for reformation by all the allegations in his Petition for Rehearing (22 to 34) which prevented the discovery of the falsity of the representations of law until the decisions in 1940, 1941, and 1942 in his second equity suit were issued by the courts (28, Pet. for Rehearing).

It would have been correct for said attorney to state the very opposite of what his mistakes assert on pages

30 and 36, for this Count I is really nothing else except a cause of action on ground of fraud (3-25). If the request to recover on the yet unreformed contract be stricken out of pages 24 and 25, then Count I is strictly a cause of action on fraud and nothing else. Since Count I of plaintiff's petition (3-25) alleges all the petitioner's fraud which postpones limitations and laches, the petitioner objects to the mistakes and misunderstandings of said attorney which might cause the Supreme Court to overlook the respondent's fraud which prevented his causes of action to reform the contract and to recover thereon as reformed from accruing before facts of fraud were discovered on February 25, 1939, and before laws on the same fraud were discovered in 1940, 1941 and 1942 from the court opinions in his second equity suit (28 Pet. for Rehearing).

This petitioner approves everything stated by said attorney in the Petition for Rehearing except said Mistakes on pages 30 and 36 which might prevent instead of helping to invoke Sections 1012, 1014, and 1031 in Petitioner's favor on the issue of limitations and laches.

The same conflict between Missouri laws and Federal laws which prevented the Petitioner from discovering the falsity of R. G. Denison's representations of law as alleged in plaintiff's petition (20) has also confused said attorney and induced him to make all the said mistakes in pleading which petitioner objects to herein. Said conflict of laws has induced said attorney to misunderstand the requirements of equity pleading in this reformation suit, and he has been thereby induced to believe mistakenly that, if this case is remanded to the Missouri State Court for trial, it is proper to join fraud and contract both in Count I and omit Count II of Plaintiff's petition (3-26).

The following Missouri laws prevented petitioner from discovering the falsity of R. G. Denison's representations of law, until petitioner discovered that the Federal law is different therefrom in Petitioner's second equity suit in 1940, 1941 and 1942, 119 F. 2d 497. Herewith please note the Missouri laws which still confuse said attorney and induce him to make said mistakes in reliance on R. G. Denison's representations thereof, to-wit:

Nixon v. *German Ins.*, 69 Mo. App. 351: "Parties in contemplation of the contract, in their preceding acts, are not limited by restrictions in the policy to special authority of secretary or president of the company."

Rickey v. *German Guarantee Town Mut. Ins. Co.*, 79 Mo. App. 485: "Restrictions against waivers except in writing signed by secretary only refers to matters transpiring after issuance of the policy."

Flournoy v. *Traders Ins. Co.*, 80 Mo. App. 655: "A Clause in a fire policy to the effect that neither the agent who issued the policy nor any other person, excepting the secretary, has authority to waive, modify, or strike from policy any of the terms and conditions, being intended to operate as a limitation on the powers of agents to waive the terms and conditions of the policy after it has been issued, does not affect their powers to agree on the terms before the issuance of it, it referring to subsequent, and not preceding acts of the parties in relation to waivers of conditions of policy.'

National Bank of Commerce of K. C. v. *Flannigan Mills and Elevator Co.*, 118 S. W. 117, 268 Mo. 547: "Several written instruments pertaining to the same subject matter may be construed together."

Nichols, Shepherd & Co. v. *Kern*, 32 Mo. App. 1: "All instruments executed contemporaneously concerning the same subject, together constitute but one contract."

Plaintiff's petition alleges (20) that R. G. Denison represented the law the same as shown by the above Missouri Decisions. But the Federal Court decision in plaintiff's case, 119 F. 2d 497, was directly contrary to the Missouri Law as represented in said petition (20, 14, 21, 22) as follows, to wit:

> 119 F. 2d 497: "It clearly appears from these pleadings and proceedings that no such evidence as that said to have been fraudulently concealed would have been relevant to the issues made in the law suit. Plaintiff sued upon the policy only and could not have introduced the so-called 'instruments' in evidence in his case in chief. If the defendant introduced proof showing plaintiff was afflicted with dementia praecox for its bearing on the question whether his injury exclusively was caused by accident the 'instruments' described, if they had been produced, would not have been competent evidence in rebuttal."

The foregoing Missouri decisions allow the respondent more opportunity to defraud the plaintiff, because such authorities do not require the sound-risk agreement to be attached to the policy in order to bind the company thereto in any legal proceedings on the policy as it stood at times of previous suits thereon (7, 8, 9). The Federal decision, from which it is necessary to infer that attachment of the sound-risk agreement to the policy is necessary in order to bind both parties thereto, would best protect the plaintiff against fraud after attachment thereof to the policy.

The new Federal rules require the Federal Court to follow the Missouri law whenever it is different from the Federal law. But the Federal Court did not do so at the time of Petitioner's second equity suit in 1940, 1941, and 1942. Instead the Federal Court rendered a decision which would be most likely to protect the great majority

of insured persons against fraudulent concealment of the insurer's knowledge of waivers of any conditions of the policy, by requiring attachment thereof onto the policy.

The Respondent's home state of New York has a statute which forbids the respondent to waive any provision which requires the policy to contain the entire contract of insurance, as follows, to-wit:

> Thompson's Laws of New York St. of 1907, Insurance, Section 58, says: "Every policy of insurance issued or delivered within the state on or after the first day of January, 1907, by any life insurance corporation doing business within the state shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application, or other writings unless the same are indorsed upon or attached to the policy when issued. Any waiver of the provisions of this section shall be void."

Missouri has no such statute which prohibits the respondent from waiving the attachment of any written agreement upon the policy. The respondent has alleged that he has no remedy at law (24). Petitioner suggests that the Court follow the New York Law as above quoted which forbids a waiver of attachment of the application or sound-risk agreement upon the policy, because the facts alleged in said petition (16, 17, 21) show that such attachment thereof is necessary to protect the petitioner as well as the largest number of other insured persons against the fraud as alleged on said pages.

There are three kinds of misrepresentations (19, 20) which are alleged to be material in Plaintiff's reformation: First, the misrepresentations which induced plaintiff to sign the application and sound-risk agreement (11), Second, the misrepresentations which induced plaintiff to

accept the policy as evidence of the defendant's acceptance of his offer (10), without having his own signature or any agent's signature on either the application or sound-risk agreement attached to the policy (14, 15); Third, the misrepresentations which prevented and delayed the plaintiff from having the policy and sound-risk agreement reformed by attaching them both together into one joint contract (16, 17, 20). The Circuit Court of Appeals in its opinion (78) only took notice of the first representations (11) which induced plaintiff to enter into the contract; and overlooked the second group of misrepresentations (14, 15) which induced plaintiff to accept the policy as sufficient evidence of defendant's acceptance of his offer without having any proof as to the nature of said offer attached to his policy; and the said Court further overlooked all the third group of misrepresentations (16, 17, 20) which prevented plaintiff from having knowledge of defendant's knowledge which bound defendant to the Sound-risk agreement and fraud of Denison in negotiation thereof which was indispensable before he could reform the contract of insurance.

This petitioner has consulted and employed about twenty lawyers in this case. They have all warned him to stay out of the Federal Court, and all declared that they hated to try an insurance case in the Federal Court, because the conflict of laws as heretofore mentioned makes it uncertain how to plead any such case in said court. This petitioner has paid a large amount to his last attorney and yet said attorney on page 37 of Petition for Rehearing denies that he has written a petition for reformation, and admits that he left the task to the petitioner and other assistants. None of the eminent attorneys so consulted can understand such conflict of laws, and the petitioner herewith presents said mistakes and misunder-

standings of said attorneys for the court to correct and harmonize as best it can.

There has been no lack of diligence on the part of this petitioner in seeking reformation of his contract of insurance. He has requested every lawyer who ever worked for him to reform the policy, but absolutely every attorney employed by him has stubbornly refused to reform said policy, except the last one, and assured this petitioner that reformation was not necessary to bind the company after the respondent represented that it had waived attachment of the sound-risk agreement to the policy. The last attorney has stubbornly refused to correct the absurdly inconsistent mistakes on pages 30 and 36 of said petition for rehearing for certiorari.

This petition for rehearing on Mistake of said attorney M. J. O'Donnell is dictated and filed without his knowledge or consent, without collaboration with him in any way, and without collusion with him at all.

The fact that the lower courts decided against this petitioner was due entirely to the mistakes of said attorney. It is the mistake of said attorney on page 7 of Petition for Reformation which says "said evidence was ruled out by the court as inadmissible in said action at law." Said mistake consisted in only making such a general statement instead of pleading the important particulars. Plaintiff objected to said attorney's absence of particulars, and said attorney refused to allow plaintiff to insert the necessary particulars as to why said sound-risk agreement was not admissible in evidence at time of trial in 1933. There are other allegations in said petition (9, 10, 21) which show more in particular that said evidence was ruled out only because of the absence of any defendant agent's signature thereon, and said attorney stubbornly insisted that it was not necessary

to emphasize said particulars by stating them plainly on page 7 of said petition. Plaintiff objected repeatedly to said attorney about the omission of said particulars and warned said attorney that the omission thereof might cause the court to misunderstand the nature of defendant's objection to said evidence and the court's ruling on the admissibility of said evidence, and thereby makes said ruling appear to make the cause of action for reformation to accrue at said time.

And sure enough the Circuit Court seized on said general statement without knowing said particulars or finding them on the other pages mentioned, and mistakenly jumped to the wrong conclusion that plaintiff's cause of action for attachment of the sound-risk agreement to the policy accrued in 1933. The Circuit Court says in its opinion (76),

> "The reasons given for the present attempted reformation is that the insured has been denied the right in his previous litigation to make proof of this special provision as part of his contract."

Said Circuit Court overlooks the allegations that defendant waived Provision 2 in regard to prior agreements (14, 20) and then continues as follows:

> "in view of the clause in the policy that 'No change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed thereon.' The petition shows on its face however, that the denial had been made as far back as 1933, by the insured's objection and the trial court's ruling in the action initially brought on the policy, from which the insured took no appeal."

Said attorney's mistake in omitting said particulars has confused all the courts and misled them to believe that plaintiff already had the evidence ready to introduce at the time of trial in 1933. But if the Court will please pay closer attention to the reasons why said sound-risk agreement was ruled out as inadmissible, it will instantly perceive that plaintiff did not have any knowledge of defendant's knowledge of said sound-risk agreement which would bind defendant thereto in any legal proceedings at said time, even for reformation thereof, as alleged in plaintiff's petition (9, 10, 16, 17, 21). It is clear from said petition for reformation that plaintiff did not yet have any knowledge of the defendant's knowledge of said agreement and was not yet in position to prove that defendant was bound thereby in any legal proceedings for either reformation or recovery in 1933.

The plaintiff alleged that he could not discover until 1942 from the court opinions in 119 F. 2d 497 as issued in 1940, 1941 and 1942, that defendant's agent's signatures on said sound-risk agreement were not relevant unless and until said agreement was attached to the policy (14, 19, 22). But said mistake of said attorney in omitting said particulars about the absence of defendant agent's signatures (9, 10, 21) and plaintiff's ignorance of defendant's knowledge of said agreement (16, 17, 19) has confused the courts and made it appear that plaintiff had already discovered from the court's ruling in 1933 that said sound-risk agreement needed to be attached to the policy in order to bind the company thereto, although the court did not pass on the question of attachment thereof in 1933.

Said Circuit Court and this Court could not reasonably decide that plaintiff's cause of action accrued in 1933 merely on the denial of the admissibility of said evidence,

if it had examined more closely into this matter and found that the plaintiff's ignorance that the defendant had knowledge of the sound-risk agreement was the only existing reason for the inadmissibility of said evidence which was revealed to the plaintiff in 1933 by the defendant's objection or the court's ruling thereon.

This same law firm which now represents the respondent was the same draft board in part in 1918 which then prevented petitioner from being sent to camp as a wrestling instructor, although he was professional featherweight wrestling champion of the world with 15 years experience as shown in his questionnaire, by sending him to a limited service camp merely as a clerk because of his defective vision, where the fact that his brother had become insane in overseas military service induced the medical board in said camp to give him a mistaken temporary discharge, subject to further call to service, near the end of the war, on ground of a mistaken entry of "dementia praecox" (6, 9) without his consent or collusion in any way, which unfortunate blunder the respondent took advantage of in order to avoid paying his insurance claim in 1933.

This same respondent which aroused prejudice against petitioner in its oral arguments for having been temporarily discharged from the army, used the same clause 9 in the policy, not only to avoid petitioner's claim because of military service (7), but to avoid many other soldier's claims because of military service, and to lapse the policies of many soldiers in 1918, and thereafter refused to reinstate the soldiers at the former premium rates after the war, thereby retaining the premiums already collected; and this same clause 9 is still used for the unpatriotic purpose of lapsing policies and avoiding claims of veterans.

It will be more patriotic for this court to realize that an important matter to veterans is involved in this suit for reformation.

Wherefore, this petitioner prays that he be given a rehearing on his Petition for Certiorari, and also on his Petition for Rehearing thereof, that the Court strike out the request for recovery in Count I of his petition for reformation and wait until Count II for recovery on the reformed contract after it has been reformed, further that the word "only" be added to the words "fraud" mentioned on pages 30 and 36 of said Petition for rehearing so as to show clearly that Count I is only grounded on fraud, and that Count II is only grounded on contract, and thus eliminate the confusion as to which count is a cause of action on contract, or on fraud, and clear up the confusion for all twenty of this petitioner's attorneys to whom petitioner has paid very large sums of money to try to solve this conflict of laws on attachment where the Respondent breached its own Provision 2 in the policy by not attaching the sound-risk agreement to the policy at the times of all previous suits when it knew that such sound-risk agreement should be attached to the policy at all said times.

Signed only by the petitioner himself.

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